No. 99-5

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME 2)

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 96-1814, 96-2316

CHRISTY BRZONKALA, PLAINTIFF-APPELLANT

v.

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD, DEFENDANTS-APPELLEES

AND

CORNELL D. BROWN; WILLIAM E. LANDSIDLE, IN HIS CAPACITY AS COMPTROLLER OF THE COMMONWEALTH, DEFENDANTS

LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE D.C. RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION

FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, AMICI CURIAE

UNITED STATES OF AMERICA,
INTERVENOR-APPELLANT

AND

CHRISTY BRZONKALA, PLAINTIFF

v.

ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD, DEFENDANTS-APPELLEES

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FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, AMICI CURIAE

[Argued: June 4, 1997]

[Decided: Dec. 23, 1997]

OPINION

Before: HALL, LUTTIG, and MOTZ, Circuit Judges.

DIANA GRIBBON MOTZ, Circuit Judge:

This case arises from the gang rape of a freshman at the Virginia Polytechnic Institute by two members of the college football team, and the school's decision to impose only a nominal punishment on the rapists. The victim alleges that these rapes were motivated by her assailants' discriminatory animus toward women and sues them pursuant to the Violence Against Women Act of 1994. She asserts that the university knew of the brutal attacks she received and yet failed to take any meaningful action to punish her offenders or protect her, but instead permitted a sexually hostile environment to flourish; she sues the university under Title IX of the Education Amendments of 1972. The district court dismissed the case in its entirety. The court held that the complaint failed to state a claim under Title IX and that Congress lacked constitutional authority to enact the Violence Against Women Act. Because we believe that the complaint states a claim under Title IX

and that the Commerce Clause provides Congress with authority to enact the Violence Against Women Act, we reverse and remand for further proceedings.

I.

Christy Brzonkala entered Virginia Polytechnic Institute ("Virginia Tech") as a freshman in the fall of 1994.[1] On the evening of September 21, 1994, Brzonkala and another female student met two men who Brzonkala knew only by their first names and their status as members of the Virginia Tech football team. Within thirty minutes of first meeting Brzonkala, these two men, later identified as Antonio Morrison and James Crawford, raped her.

Brzonkala and her friend met Morrison and Crawford on the third floor of the dormitory where Brzonkala lived. All four students talked for approximately fifteen minutes in a student dormitory room. Brzonkala's friend and Crawford then left the room.

Morrison immediately asked Brzonkala if she would have sexual intercourse with him. She twice told Morrison "no," but Morrison was not deterred. As Brzonkala got up to leave the room Morrison grabbed her, and threw her, face-up, on a bed. He pushed her down by the shoulders and disrobed her. Morrison turned off the lights, used his arms to pin down her elbows and pressed his knees against her legs. Brzon-

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[1] "On appeal from an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6), we accept as true the facts alleged in the complaint." *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir.1996).

kala struggled and attempted to push Morrison off, but to no avail. Without using a condom, Morrison forcibly raped her.

Before Brzonkala could recover, Crawford came into the room and exchanged places with Morrison. Crawford also raped Brzonkala by holding down her arms and using his knees to pin her legs open. He, too, used no condom. When Crawford was finished, Morrison raped her for a third time, again holding her down and again without a condom.

When Morrison had finished with Brzonkala, he warned her "You better not have any fucking diseases." In the months following the rape, Morrison announced publicly in the dormitory's dining room that he "like[d] to get girls drunk and fuck the shit out of them."

Following the assault Brzonkala's behavior changed radically. She became depressed and avoided contact with her classmates and residents of her dormitory. She changed her appearance and cut off her long hair. She ceased attending classes and eventually attempted suicide. She sought assistance from a Virginia Tech psychiatrist, who treated her and prescribed anti-depressant medication. Neither the psychiatrist nor any other Virginia Tech employee or official made more than a cursory inquiry into the cause of Brzonkala's distress. She later sought and received a retroactive withdrawal from Virginia Tech for the 1994-95 academic year because of the trauma.

Approximately a month after Morrison and Crawford assaulted Brzonkala, she confided in her roommate that she had been raped, but could not bring herself to discuss the details. It was not until February 1995,

however, that Brzonkala was able to identify Morrison and Crawford as the two men who had raped her. Two months later, she filed a complaint against them under Virginia Tech's Sexual Assault Policy, which was published in the Virginia Tech "University Policies for Student Life 1994-1995." These policies had been formally released for dissemination to students on July 1, 1994, but had not been widely distributed to students. After Brzonkala filed her complaint under the Sexual Assault Policy she learned that another male student athlete was overheard advising Crawford that he should have "killed the bitch."

Brzonkala did not pursue criminal charges against Morrison or Crawford, believing that criminal prosecution was impossible because she had not preserved any physical evidence of the rape. Virginia Tech did not report the rapes to the police, and did not urge Brzonkala to reconsider her decision not to do so. Rape of a female student by a male student is the only violent felony that Virginia Tech authorities do not automatically report to the university or town police.

Virginia Tech held a hearing in May 1995 on Brzonkala's complaint against Morrison and Crawford. At the beginning of the hearing, which was taped and lasted three hours, the presiding college official announced that the charges were being brought under the school's Abusive Conduct Policy, which included sexual assault. A number of persons, including Brzonkala, Morrison, and Crawford testified. Morrison admitted that, despite the fact that Brzonkala had twice told him "no," he had sexual intercourse with her in the dormitory on September 21. Crawford, who denied that he had sexual contact with Brzonkala (a denial corro-

borated by his suitemate, Cornell Brown), confirmed that Morrison had engaged in sexual intercourse with Brzonkala.

The Virginia Tech judicial committee found insufficient evidence to take action against Crawford, but found Morrison guilty of sexual assault. The university immediately suspended Morrison for two semesters (one school year), and informed Brzonkala of the sanction. Morrison appealed this sanction to Cathryn T. Goree, Virginia Tech's Dean of Students. Morrison claimed that the college denied him his due process rights and imposed an unduly harsh and arbitrary sanction. Dean Goree reviewed Morrison's appeal letter, the file, and tapes of the three-hour hearing. She rejected Morrison's appeal and upheld the sanction of full suspension for the Fall 1995 and Spring 1996 semesters. Dean Goree informed Brzonkala of this decision in a letter dated May 22, 1995. According to Virginia Tech's published rules, the decision of Dean Goree as the appeals officer on this matter was final.

In the first week of July 1995, however, Dean Goree and another Virginia Tech official, Donna Lisker, personally called on Brzonkala at her home in Fairfax, Virginia, a four-hour drive from Virginia Tech. These officials advised Brzonkala that Morrison had hired an attorney who had threatened to sue the school on due process grounds, and that Virginia Tech thought there might be merit to Morrison's "ex post facto" challenge that he was charged under a Sexual Assault Policy that was not yet spelled out in the Student Handbook.[2]

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[2] Brzonkala's complaint alleges that the Attorney General, who represented Virginia Tech, knew, or should have known, that

Dean Goree and Ms. Lisker told Brzonkala that Virginia Tech was unwilling to defend the school's decision to suspend Morrison for a year in court, and a re-hearing under the Abusive Conduct Policy that pre-dated the Sexual Assault Policy was required. To induce Brzonkala to participate in a second hearing, Dean Goree and Ms. Lisker assured her that they believed her story, and that the second hearing was a mere technicality to cure the school's error in bringing the first complaint under the Sexual Assault Policy.

The Virginia Tech judicial committee scheduled the second hearing for late July. This hearing turned out to be much more than a mere formality, however. 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

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Morrison's due process claim was meritless under Virginia law because of *Abrams v. Mary Washington College*, No. CH93-193, slip op. at 4 (Cir. Ct. City of Fredricksburg, April 27, 1994). The state court in *Abrams* rejected an almost identical claim that a student's due process rights were violated when he was charged and tried under a sexual assault policy that was adopted after the incident. *Id.* at 4.

student witnesses. Virginia Tech exacerbated this difficulty 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.

Nevertheless, after the second hearing, the university judicial committee found that Morrison had violated the Abusive Conduct Policy, and re-imposed the same sanction: an immediate two semester suspension. On August 4, 1995, the college again informed Brzonkala, in writing, that Morrison had been found guilty and been suspended for a year.

Morrison again appealed. He argued due process violations, the existence of new information, and the asserted harshness and arbitrariness of the sanction imposed on him as grounds for reversal of the judicial committee's decision. Senior Vice-President and Provost Peggy Meszaros overturned Morrison's sanction on appeal. She found "that there was sufficient evidence to support the decision that [Morrison] violated the University's Abusive Conduct Policy and that no due process violation occurred in the handling of [Morrison's] case." However, the Provost concluded that the sanction imposed on Morrison—immediate suspension for one school year—was "excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy." Provost Meszaros did not elaborate on the "other cases" to which she was referring. Instead of an immediate

one year suspension, the Provost imposed "deferred suspension until [Morrison's] graduation from Virginia Tech." In addition, Morrison was "required to attend a one-hour educational session with Rene Rios, EO/AA Compliance Officer regarding acceptable standards under University Student Policy."

Provost Meszaros informed Morrison of the decision to set aside his sanction by letter on August 21, 1995. Although Brzonkala had been informed in writing of the result at every other juncture in the disciplinary proceedings, Virginia Tech did not notify her that it had set aside Morrison's suspension or that he would be returning to campus in the Fall. Instead, on August 22, 1995, Brzonkala learned from an article in *The Washington Post* that the university had lifted Morrison's suspension and that he would return in the Fall 1995 semester. In fact, Morrison did return to Virginia Tech in the Fall of 1995—on a full athletic scholarship.

Upon learning that the university had set aside Morrison's suspension and was permitting him to return in the Fall, Brzonkala canceled her own plans to return to Virginia Tech. She feared for her safety because of previous threats and Virginia Tech's treatment of Morrison. She felt that Virginia Tech's actions signaled to Morrison, as well as the student body as a whole, that the school either did not believe her or did not view Morrison's conduct as improper. She was also humiliated by the procedural biases of the second hearing and by the decision to set aside the sanction against Morrison. Brzonkala attended no university or college during the Fall 1995 term.

On November 30, 1995, Brzonkala was shocked to learn from another newspaper article that the second Virginia Tech judicial committee did not find Morrison guilty of sexual assault, but rather of the reduced charge of "using abusive language." Despite the fact that the school had accused and convicted Morrison of sexual assault at the initial hearing, despite Morrison's testimony at that hearing that he had had sexual intercourse with Brzonkala after she twice told him "no," and despite the fact that Dean Goree and Donna Lisker had unambiguously stated that the second hearing would also address the "sexual assault" charge against Morrison, the administrators altered the charge. The university never notified either Brzonkala or her attorney about the change, leaving her to learn about it months after the fact from a newspaper article.

Brzonkala believes and so alleges that the procedural irregularities in, as well as the ultimate outcome of, the second hearing were the result of the involvement of Head Football Coach Frank Beamer, as part of a co-ordinated university plan to allow Morrison to play football in 1995.

On December 27, 1995, Brzonkala initially filed suit against Morrison, Crawford, and Virginia Tech; on March 1, 1996, she amended her complaint. She alleged *inter alia* that Virginia Tech, in its handling of her rape claims and failure to punish the rapists in any meaningful manner, violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994). She also alleged that Morrison and Crawford brutally gang raped her because of gender animus in violation of Title III of the Violence Against Women Act of 1994, 42

U.S.C. § 13981 (1994) ("VAWA"). The United States intervened to defend the constitutionality of VAWA.

On May 7, 1996 the district court dismissed the Title IX claims against Virginia Tech for failure to state a claim upon which relief could be granted. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 772 (W.D. Va. 1996) ("*Brzonkala I*"). On July 26, 1996 the court dismissed Brzonkala's VAWA claims against Morrison and Crawford, holding that although she had stated a cause of action under VAWA, enactment of the statute exceeded Congressional authority and was thus unconstitutional. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996) ("*Brzonkala II*").

II.

Title IX of the Education Amendments of 1972 provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a).

Virginia Tech concedes that it is an "education program . . . receiving Federal financial assistance." Hence, we need only determine whether Brzonkala has stated a claim that she was "subjected to discrimination" by Virginia Tech "on the basis of sex." 20 U.S.C. § 1681(a). The district court recognized that

Brzonkala pled a Title IX claim on the basis of two distinct legal theories: a hostile environment theory, that Virginia Tech responded inadequately to a sexually hostile environment; and a disparate treatment theory, that Virginia Tech discriminated against Brzonkala because of her sex in its disciplinary proceedings.[3] The district court rejected both, holding that her complaint failed to state a Title IX claim on which relief could be granted under either theory. *See Brzonkala I*, 935 F. Supp. at 775-78. We now consider whether Brzonkala stated a claim under either of these theories.

A.

We begin with the hostile environment claim.[4] To assess Brzonkala's Title IX hostile environment assertions we must address two issues: (1) what legal stan-

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[3] Brzonkala also pled a claim of disparate impact based upon Virginia Tech's policy of not automatically reporting allegations of rape to the police. Brzonkala does not press this theory on appeal. We deem it waived.

[4] Virginia Tech makes a truncated argument, without reference to the complaint or any authority, that Brzonkala has not pled a hostile environment claim with sufficient specificity. The district court "glean [ed] from [Brzonkala's] complaint an allegation that [Virginia Tech] had a hand in permitting a hostile school environment based on Brzonkala's gender." *Brzonkala I*, 935 F. Supp. at 778. We agree that Brzonkala has properly pled a hostile environment claim. All that Brzonkala was required to plead was "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis." *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S. Ct. 99, 103, 2 L.Ed.2d 80 (1957) (footnote omitted).

dard to apply to a hostile environment claim under Title IX and (2) whether Brzonkala's complaint satisfies that standard.

1.

Title IX unquestionably prohibits federally supported educational institutions from practicing "discrimination" "on the basis of sex." 20 U.S.C. § 1681(a) (1994). Because of Title IX's "short historical parentage," *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 514 (6th Cir. 1996), we have not previously faced a hostile environment claim under Title IX. Therefore, in determining whether an educational institution's handling of a known sexually hostile environment is actionable "discrimination" under Title IX, we must look to the extensive jurisprudence developed in the Title VII context. *See Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX."); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) ("Title VII . . . is 'the most appropriate analogue when defining Title IX's substantive standards. . . .'"); *Lipsett v. University of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988) ("Because Title VII prohibits the identical conduct prohibited by Title IX, *i.e.*, sex discrimination" Title VII is "the most appropriate analogue when defining Title IX's substantive standards. . . .") (citation omitted); *see also Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 75, 112 S. Ct. 1028, 1037-38, 117 L.Ed.2d 208 (1992) (holding Title IX provides a private cause of action for damages arising from sexual harass-

ment and relying on *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L.Ed.2d 49 (1986), a Title VII hostile environment case, to define "discrimination" under Title IX); H.R. Rep. No. 554 (1971) *reprinted in* 1972 U.S.C.C.A.N. 2462, 2512 (explaining that Title IX meant to provide coverage similar to Title VII for "those in education"); and the many cases adopting Title VII analysis in a Title IX hostile environment context listed *infra* at 21-22.[5] The district court properly followed this approach and applied Title VII standards to determine Virginia Tech's liability for a hostile environment under Title IX. *See Brzonkala I*, 935 F. Supp. at 776-78.

Virginia Tech argues that this was error, relying solely upon *Rowinsky* v. *Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, —- U.S. ——, 117 S. Ct. 165, 136 L.Ed.2d 108 (1996). *Rowinsky* dealt with a hostile environment claim by two female students against a school district for its response to sexual harassment by certain male students. A divided panel of the Fifth Circuit defined the question presented as "whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents." *Id.* at 1010. In answering this question, the court determined that the language and legislative history of Title IX indicated that the statute "applies only to the practices of the recipients themselves," not third parties. *Id.* at 1013. The *Rowinsky* court

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[5] *But see Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014 (7th Cir. 1997) (recognizing that most other courts apply Title VII principles to Title IX cases but refusing to apply Title VII's "knew or should have known" standard to a Title IX claim).

reasoned that Title VII principles were inapplicable because "[i]n an employment context, the actions of a co-worker sometimes may be imputed to an employer through a theory of respondeat superior," but a school may not be held responsible for the harassment of one student by another. *Id.* at 1011 n.11. Accordingly, the Fifth Circuit held that "[i]n the case of [Title IX] peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls . . . ." *Id.* at 1016.

We have no trouble agreeing with the Fifth Circuit that Title IX "applies only to the practices of the recipients themselves." *Id.* at 1013. However, in this respect Title IX is no different from Title VII—the *Rowinsky* majority's failure to recognize this results in a deeply flawed analysis. In framing the question in terms of liability for the acts of third parties, *Rowinsky* misstates what a plaintiff, under either Title VII or Title IX, hopes to prove in a hostile environment claim. Under Title VII, a plaintiff cannot recover because a fellow employee sexually harassed the plaintiff, but only because an *employer* could have, but failed to, adequately remedy known harassment. As we recently noted, "an employer is liable for a sexually hostile work environment created by . . . [an] employee only if the employer knew or should have known of the illegal conduct and *failed to take prompt and adequate remedial action*." *Andrade* v. *Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (emphasis added). Consequently, a defendant employer is held responsible under Title VII for the employer's own actions, its

inadequate and tardy response, not the actions of fellow employees.[6]

Similarly, in a Title IX hostile environment action a plaintiff is not seeking to hold the school responsible for the acts of third parties (in this case fellow students). Rather, the plaintiff is seeking to hold the school responsible for its own actions, i.e. that the school "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." *Andrade*, 88 F.3d at 261. Brzonkala is not attempting to hold Virginia Tech responsible for the acts of Morrison and Crawford *per se*; instead she is challenging Virginia Tech's handling of the hostile environment once she notified college officials of the rapes. Therefore, the entire focus of *Rowinsky*'s analysis as to whether a school may be held responsible for the acts of third parties under Title IX misses the point. Brzonkala does not seek to make Virginia Tech liable for the acts of third parties. She seeks only to hold the school liable *for its own* discriminatory actions in failing to remedy a known hostile environment.

A defendant educational institution, like a defendant employer, is, of course, liable for its own discriminatory actions: even the *Rowinsky* majority acknowledges

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[6] After oral argument in this case, the Eleventh Circuit followed *Rowinsky*, *see Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), but the Ninth Circuit flatly rejected the *Rowinsky* rationale. *See Oona v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997). As explained above, we, like the Ninth Circuit, "have difficulty squaring *Rowinsky's* reasoning with the Supreme Court's in *Franklin*" and our own circuit precedent, *e.g.*, *Preston*, 31 F.3d at 207, and *Andrade*, 88 F.3d at 261. *See Oona*, 122 F.3d at 1210.

this. *Rowinsky*, 80 F.3d at 1012 (Title IX "prohibits discriminatory acts" by educational institutions receiving federal financial assistance). Responsibility for discriminatory acts includes liability for failure to remedy a known sexually hostile environment. Accordingly, the district court was correct in applying Title VII principles to define the contours of Brzonkala's hostile environment claim. We now turn to that application.

2.

Under Title VII "to prevail on a 'hostile work environment' sexual harassment claim, an employee must prove: (1) that he [or she] was harassed 'because of' his [or her] 'sex'; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer." *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996). Similarly, under Title IX a plaintiff asserting a hostile environment claim must show: "1) that she [or he] belongs to a protected group; 2) that she [or he] was subject to unwelcome sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her [or his] education and create an abusive educational environment; and 5) that some basis for institutional liability has been established." *Kinman v. Omaha Public Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996) (same); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159, 116 S. Ct. 1044, 134 L.Ed.2d 191 (1996) (same); *Nicole M. v. Martinez*

Unified Sch. Dist., 964 F. Supp. 1369, 1376 (N. D. Cal. 1997) (same); *see also Doe*, 103 F.3d at 515 (holding that the elements of a "hostile environment claim under Title VII equally apply under Title IX"); *Oona, R.S. v. McCaffrey*, 122 F.3d 1207, 1210 (9th Cir. 1997) (applying Title VII standards to Title IX hostile environment claim); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-51 (2d Cir. 1995) (same); *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209, 1213-14 (E.D. Pa. 1997) (same); *Pinkney v. Robinson*, 913 F. Supp. 25, 32 (D. D. C. 1996) (same); *Bosley v. Kearney R-1 School Dist.*, 904 F. Supp. 1006, 1021-22 (W. D. Mo. 1995) (same); *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 749-50 (E.D. Va. 1995) (same); *Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367, 374 (D. Md. 1994) (same).

Virginia Tech concedes that Brzonkala has properly alleged the first three elements—that she was a member of a protected class, that she was subject to unwelcome harassment, and that this harassment was based on her sex. Virginia Tech contends, however, that Brzonkala has not alleged that she was subjected to a sufficiently abusive environment, or established that Virginia Tech may be held liable for that environment. Accordingly, we address these two elements.

a.

A Title IX plaintiff must allege sexual harassment "sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment." *Kinman*, 94 F.3d at 468. Virginia Tech argues that because Brzonkala did not

return to school she experienced no hostile environment. The district court agreed, holding that:

> [T]he hostile environment that Brzonkala alleged never occurred. Brzonkala left [Virginia Tech] due to her concern of possible future reprisal in reaction to her pressing charges. She did not allege that this future reprisal actually occurred. Second, Brzonkala did not perceive that the environment was in fact abusive, but only that it might become abusive in the future.

Brzonkala I, 935 F. Supp. at 778.

Brzonkala pled that she was violently gang raped, and rape "is 'not only pervasive harassment but also criminal conduct of the most serious nature' that is 'plainly sufficient to state a claim for 'hostile environment' sexual harassment.'" *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir.), *cert. denied*, 516 U.S. 1011, 116 S. Ct. 569, 133 L.Ed.2d 493 (1995) (quoting *Meritor*, 477 U.S. at 67, 106 S. Ct. at 2405-06); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) ("Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex."); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (citing *Meritor* and recognizing sexual assault as an extreme example of sexual harassment); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 Ind. L.J. 1123, 1124 (1994) ("Rape and molestation provide drastic examples of the types of sexual harassment students inflict on their peers.").

Moreover, "even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (citing *Meritor*, 477 U.S. at 67, 106 S. Ct. at 2405-06); *see also King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (acknowledging that "a single act [of discrimination] can be enough" to state a hostile environment claim under Title VII).

Thus, the district court failed to recognize that the rapes themselves created a hostile environment, and that Virginia Tech was aware of this environment and never properly remedied it. Indeed, the university Provost's rationale for overturning Morrison's immediate suspension for one school year—that this punishment was "excessive when compared with other cases"—itself evidences an environment hostile to complaints of sexual harassment and a refusal to effectively remedy this hostile environment. Given the seriousness of the harassment acts, the total inadequacy of Virginia Tech's redress, and Brzonkala's reasonable fear of unchecked retaliation including possible violence, Brzonkala did not have to return to the campus the next year and personally experience a continued hostile environment. Brzonkala "should not be punished for a hostile environment so severe that she was forced out entirely by loss of her legal claim against those responsible for the situation." *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1298 (N.D. Cal. 1993); *see also Carrero v. New York City Housing Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) ("A female employee need not subject herself to an extended period of demeaning and degrading provocation

before being entitled to seek the remedies provided under Title VII.").

b.

The remaining issue is whether "some basis for institutional liability has been established." *Seamons*, 84 F.3d at 1232. "[A]n employer is liable for a sexually hostile work environment created by . . . [an] employee only if the employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." *Andrade*, 88 F.3d at 261. We must determine whether Brzonkala has alleged facts sufficient to support an inference that Virginia Tech "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." Virginia Tech certainly knew about the rapes once Brzonkala informed the school and initiated disciplinary proceedings against Morrison and Crawford. The question, therefore, is whether Virginia Tech took prompt and adequate remedial action once it was on notice of the rapes. *See Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc). This inquiry is necessarily fact-based, and whether a response is "prompt and adequate" will depend on the specific allegations (and ultimately evidence) in each case. *Id.* at 106-07.

Brzonkala alleges that after she was brutally raped three times she ceased attending classes, attempted suicide, and sought the aid of the school psychiatrist. Despite Virginia Tech's awareness of these developments no university official, including the psychiatrist, ever made more than a cursory inquiry into the cause of

her distress. Furthermore, she alleges that when she directly reported the rapes to Virginia Tech authorities, the college neither provided a fair hearing nor meted out appropriate punishment. During the first hearing her attacker essentially admitted that he raped her after she twice told him no. The first hearing resulted in a finding that Morrison had committed sexual assault, and his suspension for one school year. This result was upheld by an appeals officer, and under Virginia Tech's published rules that decision was final and not subject to change.

Nevertheless, Virginia Tech voided the first hearing and reopened the case against her admitted rapist, assertedly in violation of its own rules and on the basis of a specious legal argument. The second hearing was procedurally biased against Brzonkala in numerous ways, and unbeknownst to her, Morrison was only charged with the lesser offense of using abusive language. Still, Morrison was again found guilty, and suspended for the next school year. On appeal a senior college official determined that there was sufficient evidence that Morrison had violated the University's Abusive Conduct Policy, and that Morrison's due process argument was meritless. Nonetheless, the appeals officer decided that suspending Brzonkala's rapist for a school year was "excessive when compared with other cases." The university then overturned that suspension and permitted her attacker to return to school with a full athletic scholarship.

Virginia Tech took this action without notifying Brzonkala, although she had been informed of the university's actions in the case at every previous juncture. This decision caused her to fear for her safety

and to withdraw from college altogether. As punishment for his admitted rape Morrison received a "deferred suspension until [his] graduation from Virginia Tech" and "a one-hour educational session."

In short, Brzonkala alleges that Virginia Tech permitted, indeed fostered, an environment in which male student athletes could gang rape a female student without any significant punishment to the male attackers, nor any real assistance to the female victim. She alleges a legion of procedural irregularities in the hearing process, Virginia Tech's disregard for its own rules of finality, and its eventual decision to impose virtually no penalty for an admitted rape. These facts, if proven, would allow a jury to find that Virginia Tech's response to Brzonkala's gang rape was neither prompt nor adequate.

Virginia Tech argues that because it did levy some punishment against Morrison, its response was adequate. A defendant need not "make the most effective response possible" to sexual harassment. *See Spicer v. Virginia Dept. of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc). This does not mean, however, that any remedy, no matter how delayed or weak, will be adequate. Rather, we have consistently held under Title VII that a defendant employer is "liable for sexual harassment committed by its employees if no adequate remedial action is taken." *Id.* Similar reasoning applies in the Title IX context. In light of the seriousness of Brzonkala's allegations, the long and winding disciplinary process, and the proverbial slap on the wrist as punishment, we cannot conclude at this preliminary stage that Virginia Tech's remedy was either prompt or adequate.

For all of these reasons, Brzonkala has alleged sufficient facts to state a Title IX hostile environment claim against Virginia Tech.

B.

Brzonkala also alleges a Title IX disparate treatment claim, *i.e.*, that Virginia Tech discriminated against her on the basis of sex during the disciplinary proceedings against Morrison and Crawford. In analyzing Brzonkala's claim, Title VII again "provide[s] a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX." *Preston*, 31 F.3d at 207.

Indeed, Virginia Tech does not even argue that Title VII principles are inapplicable in analyzing Title IX disparate treatment claims.

Proof of discriminatory intent is necessary to state a disparate treatment claim under Title VII. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977). Absent some indication in the statute or regulations, Title IX similarly requires proof of discriminatory intent to state a disparate treatment claim. As such, we must examine Brzonkala's complaint to see if she has alleged sufficient facts to infer such intent. *See Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994).

In *Yusuf*, the Second Circuit dealt with allegations of a discriminatory school disciplinary hearing, and described the type of evidence a plaintiff must plead to establish the requisite intent:

> [A]llegations of a procedurally or otherwise flawed [school disciplinary] proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss. The fatal gap is, again, the lack of a particularized allegation relating to a causal connection between the flawed outcome and gender bias. A plaintiff must thus also allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding. Allegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases. . . . Such allegations might include, *inter alia*, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender. Of course, some allegations, such as statements reflecting bias by members of the tribunal, may suffice both to cast doubt on the accuracy of the disciplinary adjudication and to relate the error to gender bias.

Yusuf, 35 F.3d at 715 (citations omitted). In this case Brzonkala has alleged a flawed proceeding and made a conclusory assertion that Virginia Tech discriminated in favor of male football players. But she has not alleged any discriminatory statements or treatment by Virginia Tech, or any systematic mistreatment of women or rape victims.

Nevertheless, Brzonkala maintains that she has made sufficient allegations of Virginia Tech's discriminatory intent. First, she argues that Virginia Tech's policy of

not automatically reporting rapes to the police shows a discriminatory intent. Brzonkala does not allege, however, that the university discouraged or hindered her (or other rape victims) from filing charges, or that the university generally treats rape less seriously in its own disciplinary proceedings. Nor does she state facts to support an inference that the university created its non-reporting policy to discriminate against rape victims. Without an allegation that Virginia Tech itself fails to punish rapists, or impedes criminal investigations, or separate facts to establish that the policy was a result of gender bias, the university has not discriminated against rape victims, because these victims can always pursue criminal charges themselves. In fact, because of the intensely personal nature of the crime, as well as the present day difficulties inherent in pursuing rape charges, a victim of rape may not always want to press charges or involve the police. *See Brzonkala I*, 935 F. Supp. at 777.

Next, Brzonkala relies upon allegations that her access to evidence, like that of the plaintiff in *Yusuf*, was hampered, as the factual basis for a finding of discriminatory intent. It is true that in *Yusuf* the plaintiff alleged numerous procedural difficulties. *Yusuf*, 35 F.3d at 712-13. But, in *Yusuf* the plaintiff also asserted that "males accused of sexual harassment at Vassar are 'historically and systematically' and 'invariably found guilty, regardless of the evidence, or lack thereof.'" *Id.* at 716. This sort of systematic discrimination, on top of the procedural irregularities, sufficed to state a claim of disparate treatment. Here we have nothing but "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory

allegation of gender discrimination." *Id.* at 715. These allegations are "not sufficient to survive a motion to dismiss." *Id.*; cf. *Houck v. Virginia Polytechnic Inst. & State Univ.*, 10 F.3d 204, 206-07 (4th Cir. 1993) ("[I]n the Title VII context, isolated incidents or random comparisons demonstrating disparities in treatment may be insufficient to draw a *prima facie* inference of discrimination without additional evidence that the alleged phenomenon of inequality also exists with respect to the entire relevant group of employees."); *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511-13 (4th Cir. 1993) (same).

Finally, Brzonkala contends that the woefully inadequate punishment meted out against Morrison is in and of itself proof of sex discrimination. Again, without more, this does not prove intentional gender discrimination against Brzonkala. In sum, the district court correctly dismissed Brzonkala's Title IX claim of disparate treatment.[7]

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[7] Virginia Tech also argues that Brzonkala lacks standing to pursue injunctive relief in her Title IX claim because she has left school and does not plan to return. The record before us does not support Virginia Tech's claim that Brzonkala will never again attend Virginia Tech. All that the complaint alleges is that Brzonkala did not return to Virginia Tech in the Fall of 1995. Without a factual basis for believing that Brzonkala will not re-register at Virginia Tech, we will not dismiss for mootness her claims for injunctive relief.

III.

We now turn to the question of whether the district court erred in dismissing Brzonkala's claim that Morrison and Crawford violated Title III of the Violence Against Women Act of 1994 ("VAWA"). *See* 42 U.S.C. § 13981 (1994). The district court held that Brzonkala alleged a valid VAWA claim, but that VAWA was beyond congressional authority, and thus unconstitutional. *See Brzonkala II*, 935 F. Supp. at 801. We agree with the district court that Brzonkala stated a claim under VAWA. We conclude, however, that Congress acted within its authority in enacting VAWA and hold that the district court erred in ruling the statute unconstitutional.

A.

In September 1994, after four years of hearings, Congress enacted VAWA, a comprehensive federal statute designed to address "the escalating problem of violent crime against women." S. Rep. No. 103-138, at 37 (1993). Title III, the portion of the statute at issue in this case, establishes the right upon which a civil claim can be brought:

> All persons within the United States shall have the right to be free from crimes of violence motivated by gender. . . .

42 U.S.C. § 13981(b).

The statute goes on to set forth the elements necessary to plead and prove such a claim:

> (c) Cause of action
>
> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
>
> (d) Definitions
>
> For purposes of this section–
>
> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
>
> (2) the term "crime of violence" means–
>
> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in Section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the

> special maritime, territorial, or prison jurisdiction of the United States; and
>
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981. Thus, to state a claim under § 13981(c) a plaintiff victim must allege "a crime of violence motivated by gender." 42 U.S.C. § 13981(c).

Morrison and Crawford do not argue that Brzonkala's allegation of gang rape fails to satisfy § 13981(d)(2)'s definition of a "crime of violence." However, they do briefly assert that Brzonkala has failed to allege a "crime of violence *motivated by gender*." 42 U.S.C. § 13981(c) (emphasis added).

A "crime of violence motivated by gender" is defined as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). Congress has indicated that "[p]roof of 'gender motivation' under Title III" of VAWA is to "proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws. Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event." S. Rep. No. 103-138, at 52; *see also* S. Rep. No. 102-197, at 50 (1991).

The statute does not outlaw "[r]andom acts of violence unrelated to gender." 42 U.S.C. § 13981(e)(1).

However, bias "can be proven by circumstantial as well as indirect evidence." S. Rep. No. 103-138, at 52. "Generally accepted guidelines for identifying hate crimes may also be useful" in determining whether a crime is gender-motivated, such as: "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense." *Id.* at 52 n.61.

With these standards in mind, we examine Brzonkala's complaint. Brzonkala alleges that two virtual strangers, Morrison and Crawford, brutally raped her three times within minutes after first meeting her. Although Brzonkala does not allege mutilation or other severe injury, the brutal and unprotected gang rape itself constitutes an attack of significant "severity." *Id.* Moreover, Brzonkala alleges that the rapes were completely without "provocation." *Id.* One of her assailants conceded during the college disciplinary hearing that Brzonkala twice told him, "No" before he initially raped her. Further, there is an absence of any "apparent motive" for the rapes other than gender bias. *Id.* For example, no robbery or other theft accompanied the rapes.

Finally, Brzonkala alleges that when Morrison had finished raping her for the second time he told her, "You better not have any fucking diseases." She also alleges that Morrison later announced to the college dining room, "I like to get girls drunk and fuck the shit out of them." Verbal expression of bias by an attacker is certainly not mandatory to prove gender bias, *Brzonkala II*, 935 F. Supp. at 785 ("The purpose of the

statute would be eviscerated if, to state a claim, a plaintiff had to allege, for example, that the defendant raped her and stated, 'I hate women.' "), but it is "helpful." *See* S. Rep. No. 103-138, at 51. As the district court noted, Morrison's "statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent" and that "[t]his statement indicates disrespect for women in general and connects this gender disrespect to sexual intercourse." *Brzonkala II*, 935 F. Supp. at 785. In addition, since Brzonkala alleged that Morrison and Crawford engaged in a conspiracy to rape her, Morrison's comments are also relevant in assessing Crawford's liability. *See Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 103 (3d Cir. 1993) (concluding that in a civil conspiracy "every conspirator is jointly and severally liable for all acts of co-conspirators taken in furtherance of the conspiracy"); *United States v. Carpenter*, 961 F.2d 824, 828 n. 3 (9th Cir. 1992) (holding that "acts and statements in furtherance of the conspiracy may be attributed to" a co-conspirator and citing *Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 1183-84, 90 L.Ed. 1489 (1946)); *United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990) (same).

In sum, Brzonkala has clearly alleged violations of VAWA. Virtually all of the earmarks of "hate crimes" are asserted here: an unprovoked, severe attack, triggered by no other motive, and accompanied by language clearly stating bias. The district court correctly concluded that Brzonkala alleged a VAWA claim.

B.

The remaining issue before us is whether the district court correctly held that Congress exceeded its constitutional authority in enacting VAWA. Congress itself directly addressed this question. On the basis of numerous specific findings and a mountain of evidence, Congress stated that it was invoking its authority "[p]ursuant to . . . section 8 of Article I of the Constitution" to enact a new civil rights law to protect "victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce. . . ." 42 U.S.C. § 13981(a) (emphasis added).[8] Article I, Section 8, Clause 3 of the Constitution empowers Congress to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

In assessing whether Congress exceeded its authority under the Commerce Clause, we note that every act of Congress is entitled to a "strong presumption of validity and constitutionality," *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984), and will be invalidated only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384, 109 S. Ct. 647, 661, 102 L.Ed.2d 714 (1989). The Supreme Court has directed that "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Govern-

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[8] Congress also expressly stated that Section 5 of the Fourteenth Amendment authorized enactment of VAWA. *See* 42 U.S.C. § 13981(a). In view of our holding that VAWA is a valid exercise of Congress' power under the Commerce Clause, we need not reach the question of whether the Fourteenth Amendment also provided authorization for VAWA.

ment,'" a court is "not lightly [to] second-guess such legislative judgments." *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 251, 110 S. Ct. 2356, 2372, 110 L.Ed.2d 191 (1990) (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319, 105 S. Ct. 3180, 3188, 87 L.Ed.2d 220 (1985)). This is "particularly" true when, as here, the legislative "judgments are based in part on empirical determinations." *Id.* Deference to such judgments by the legislature constitutes the "paradigm of judicial restraint." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 113 S. Ct. 2096, 2101, 124 L.Ed.2d 211 (1993).

Moreover, "[t]he task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276, 101 S. Ct. 2352, 2360 (1981); *see also United States v. Lopez*, 514 U.S. 549, 568, 115 S. Ct. 1624, 1634, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring) ("The history of the judicial struggle to interpret the Commerce Clause . . . counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power."). Thus, a reviewing court need only determine "whether a rational basis existed for concluding that a regulated activity" substantially affects interstate commerce. *Lopez*, 514 U.S. at 557, 115 S. Ct. at 1628-29.

With these directives in mind, we consider whether Congress exceeded its authority under the Commerce Clause in passing VAWA. The Supreme Court has long held, and recently reiterated in *Lopez*, that there are

"three broad categories of activity that Congress may regulate" under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-559, 115 S. Ct. at 1629-30 (citations omitted); *United States v. Bailey*, 112 F.3d 758, 765-66 (4th Cir. 1997), *cert. denied*, —- U.S. ——, 118 S. Ct. 240, 139 L.Ed.2d 170 (1997) (rejecting a *Lopez* challenge to Title II of VAWA and stating *Lopez*'s three-part test).

Here, as in *Lopez*, "[t]he first two categories of authority may be quickly disposed of:" VAWA "is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [VAWA] be justified as a regulation [protecting] an instrumentality of interstate commerce or a thing in interstate commerce." *Lopez*, 514 U.S. at 559, 115 S. Ct. at 1630. "Thus, if [VAWA] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce." *Id.*

The *Lopez* Court applied the substantial effects test to the Gun Free School Zones Act, which made it a federal crime to knowingly possess a firearm in a school zone. 18 U.S.C. § 922(q) (1988 ed. Supp. V) (amended 1994, 1996). In passing § 922(q), Congress attempted to supplant state criminal laws with a federal statute that criminalized an activity that on its face had "nothing to do with" commerce, without making *any* findings demonstrating the activity affected interstate commerce or including a jurisdictional element ensuring a case by case connection with interstate commerce. *Lopez*, 514 U.S. at 561 and n. 3, 115 S. Ct. at 1630-31 and n. 3. In these circumstances, the Supreme Court "would have [had] to pile inference upon inference" to find a rational basis for concluding the statute "substantially affect[ed] any sort of interstate commerce." *Id.* at 567, 115 S. Ct. at 1634. This the Court declined to do, and so declared § 922(q) unconstitutional. *Id.*

In contrast to the congressional silence in *Lopez*, Congress made voluminous findings when it enacted VAWA. Accordingly, we can begin where the *Lopez* Court could not, by "evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce." *Lopez*, 514 U.S. at 563, 115 S. Ct. at 1632; *see also City of Boerne v. Flores*, —- U.S. ——, —— - ——, 117 S. Ct. 2157, 2169-2170, 138 L.Ed.2d 624 (1997) (recognizing the importance of Congressional findings in determining the "appropriateness of [Congress's] remedial measures"). In doing so, we recognize that discerning a rational basis "is ultimately a judicial rather than a legislative question," *Lopez*, 514 U.S. at 557 n.2, 115 S. Ct. at 1629 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 366, 13 L.Ed.2d 258 (1964) (Black, J., concurring)),

and "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (quoting *Hodel*, 452 U.S. at 311, 101 S. Ct. at 2391 (Rehnquist, J., concurring)). But a "court must defer" to congressional findings when there is "a rational basis for such a finding." *Hodel*, 452 U.S. at 276, 101 S. Ct. at 2360. Indeed, "[t]he Supreme Court has without fail given effect to such congressional findings." Laurence H. Tribe, *American Constitutional Law*, 310-11 (2d ed. 1988). Accordingly, we first examine the congressional findings made in connection with VAWA. *See United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995) (rejecting a *Lopez* challenge to the "Comprehensive Drug Abuse Prevention and Control Act" and beginning and ending our analysis by relying totally upon Congress's "detailed findings" on the interstate commerce effects).

1.

The Congressional findings and testimony that support the passage of VAWA pursuant to the Commerce Clause are detailed and extensive.[9] Congress carefully

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[9] Most of Congress's copious findings do not appear in the statute itself, but in applying rational basis review courts also consider congressional committee findings. *See Lopez*, 514 U.S. at 562, 115 S. Ct. at 1631; *Preseault v. ICC*, 494 U.S. 1, 17, 110 S. Ct. 914, 924-25, 108 L.Ed.2d 1 (1990) (citing House Report in discussion of congressional findings regarding effect on interstate commerce of federal "rails-to-trails" statute); *Hodel*, 452 U.S. at 277-80, 101 S. Ct. at 2360-62 (relying on committee reports to uphold Congress's power to enact the Surface Mining Act); *Hoffman v. Hunt*, 126 F.3d 575, 586 (4th Cir. 1997) (relying upon a House Report to uphold FACE).

documented the enormity of the problem caused by violence against women. For example, Congress found that:

* "Violence is the leading cause of injury to women ages 15-44. . . ." S. Rep. No. 103-138, at 38 (1993).

* "[F]or the past 4 years [prior to 1993], the U.S. Surgeons General have warned that family violence—not heart attacks or cancer or strokes—poses the single largest threat of injury to adult women in this country." *Id.* at 41- 42 (footnote omitted).

* "An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence victims are women." H.R.Rep. No. 103-395, at 26 (1993) (footnotes omitted).

* "Three out of four American women will be victims of violent crimes sometime during their life." *Id.* at 25 (footnote omitted).

* "Since 1988, the rate of incidence of rape has risen four and a half times as fast as the total crime rate. There were 109,062 reported rapes in the United States in 1992—one every five minutes. The actual number of rapes committed is approximately double that figure. . . ." *Id.* (footnotes omitted).

The committee reports similarly found that "the cost to society" resulting from violence against women "is staggering." S. Rep. No. 101-545, at 33 (1990). Domes-

tic violence *alone* is estimated to cost employers "at least $3 billion—not million, but billion—dollars a year" due to absenteeism in the workplace. *Id.* Furthermore, "estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103-138, at 41. Moreover, "[i]t is not a simple matter of adding up the medical costs, or law enforcement costs, but of adding up all of those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems." S. Rep. No. 101-545, at 33.

These monetary figures were accompanied by other evidence establishing that violence against women has a substantial impact on interstate commerce:

> Over 1 million women in the United States seek medical assistance each year for injuries sustained by their husbands or other partners. As many as 20 percent of hospital emergency room cases are related to wife battering.
>
> But the costs do not end there: woman abuse "has a devastating social and economic effect on the family and the community." . . . It takes its toll in homelessness: one study reports that as many as 50 percent of homeless women and children are fleeing domestic violence. It takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence.

S. Rep. No. 101-545, at 37. Fear of violence "takes a substantial toll on the lives of all women, in lost work,

social, and even leisure opportunities." S. Rep. No. 102-197, at 38 (1991).

Thus, based upon an exhaustive and meticulous investigation of the problem, Congress found that:

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

H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.[10]

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[10] House Conference Report 103-711, containing the express finding that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce," was drafted by the House and Senate Conference Committees on VAWA, and was passed along with VAWA by the House on August 21, 1994 and by the Senate on August 24, 1994. *See Violence Against Women* § 5:42 (David Frazee et al. eds., 1997). Indeed, the findings in Report 103-711 were part of the original text of VAWA and were removed to the conference report only to avoid cluttering the U.S.Code with "'congressional findings' that had no force of law." *Id.* § 5:40. VAWA, of course, was enacted before *Lopez*, when the necessity of expressly finding that regulated activity had a "substantial effect" upon commerce (rather than just an "effect") was not altogether clear. Thus, it is particularly telling that in passing VAWA Congress found that gender-based violence against women does "substantially affect" interstate commerce.

In concluding that "[t]here is no doubt that Congress has the power to create the Title III remedy under" the Commerce Clause, Congress noted that:

> [g]ender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full participation in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence. . . . For example, women often refuse higher paying night jobs in service/retail industries because of the fear of attack. Those fears are justified: the No. 1 reason why women die on the job is homicide and the highest concentration of those women is in service/retail industries . . . . 42 percent of deaths on the job of women are homicides; only 12 percent of the deaths of men on the job are homicides.

S. Rep. No. 103-138, at 54 & n.70 (footnotes omitted).

Our task is simply to discern whether Congress had "a rational basis" for concluding that the regulated activity—here violence against women—substantially "affected interstate commerce." *Lopez*, 514 U.S. at 558-

559, 115 S. Ct. at 1629-30.[11] After four years of hearings and consideration of voluminous testimonial, statistical, and documentary evidence, Congress made an unequivocal and persuasive finding that violence against women substantially affects interstate commerce. Even the district court recognized that "[a] reasonable inference from the congressional findings is that violence against women has a major effect on the national economy." *Brzonkala II*, 935 F. Supp. at 792. Accordingly, whatever one's doubts as to whether Title III of VAWA represents a good policy decision, *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997), we can only conclude that Congress' findings are grounded in a rational basis. We note that every court to consider the question except the court below, has so held. *See Crisonino v. New York City Housing Auth.*, No. 96 Civ. 9742(HB) (S.D.N.Y. Nov. 18, 1997); *Anisimov v. Lake*,

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[11] We and the ten other circuits to consider the matter have all applied the rational basis test to post-*Lopez* Commerce Clause challenges. *See Hoffman*, 126 F.3d 575, 583-88 (stating and applying rational basis test); *United States v. Knutson*, 113 F.3d 27, 29 (5th Cir. 1997) (same); *United States v. Parker*, 108 F.3d 28, 30 (3rd Cir. 1997), *cert. denied*, —- U.S. ——, 118 S. Ct. 111, 139 L.Ed.2d 64 (1997) (same); *United States v. Olin Corp.*, 107 F.3d 1506, 1509 (11th Cir. 1997) (same); *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (same); *Terry v. Reno*, 101 F.3d 1412, 1416 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264, 117 S. Ct. 2431, 138 L.Ed.2d 193 (1997) (same); *Proyect v. United States*, 101 F.3d 11, 12 (2d Cir. 1996) (same); *United States v. McHenry*, 97 F.3d 125, 128 (6th Cir. 1996), *cert. denied*, 519 U.S. 1131, 117 S. Ct. 992, 136 L.Ed.2d 873 (1997) (same); *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir. 1996), *cert. denied*, —- U.S. ——, 117 S. Ct. 753, 136 L.Ed.2d 690 (1997) (same); *United States v. Kenney*, 91 F.3d 884, 889 (7th Cir. 1996) (same); *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996), *cert. denied*, —- U.S. ——, 117 S. Ct. 613, 136 L.Ed.2d 538 (1996) (same).

982 F. Supp. 531 (N.D. Ill. 1997); *Seaton*, 971 F. Supp. at 1194; *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996).

In fact, in *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995), we recently relied exclusively on less extensive Congressional findings to uphold Section 401(a)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1) (1994). *Id.* at 1111, 1112. In *Leshuk* the defendant was convicted of possessing and cultivating marijuana in violation of § 841(a)(1), and raised a *Lopez* challenge to the statute. Id. at 1107-08. We held that *Lopez* did not require the invalidation of § 841(a)(1) because the "intrastate drug activities" that it regulated "are clearly tied to interstate commerce." 65 F.3d at 1112. We based our conclusion wholly on Congress's "detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, have a substantial and direct effect upon interstate drug trafficking and that effective control of the interstate problems requires the regulation of both intrastate and interstate activities." *Id.* (internal quotation marks omitted). Without further ado we "relied upon these findings" to hold the Commerce Clause authorized Congress to enact this statute. *Id.*

Similarly, earlier this year, in *Hoffman v. Hunt* we reviewed "the congressional reports" to uphold the Freedom of Access to Clinics Act (FACE), determining that those reports made "clear" that "several aspects of interstate commerce are directly and substantially affected by the regulated conduct." 126 F.3d 575, 586-88 (4th Cir. 1997). Because Congress had made these persuasive findings we concluded that we did not need

to "'pile inference upon inference' to find a substantial effect on interstate commerce." *Id.* (quoting *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1633-34). The congressional findings setting forth VAWA's substantial effect on interstate commerce are far more detailed and complete than those we found sufficient to establish a rational basis for the statutes challenged in *Leshuk* and *Hoffman*, and we thus have no hesitation similarly upholding VAWA. When a court finds "that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, [its] investigation is at an end." *United States v. Beuckelaere*, 91 F.3d 781, 785 (6th Cir. 1996) (quoting *Katzenbach v. McClung*, 379 U.S. 294, 303, 85 S. Ct. 377, 383, 13 L.Ed.2d 290 (1964)).[12]

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[12] Indeed, post-*Lopez*, numerous courts have reiterated that such deference to congressional findings is required; "court[s] must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Terry*, 101 F.3d at 1416; *Proyect*, 101 F.3d at 12-13 (same); *United States v. McKinney*, 98 F.3d 974, 979 (7th Cir. 1996) (same), *cert. denied*, 520 U.S. 1110, 117 S. Ct. 1119, 137 L.Ed.2d 319 (1997); *Hampshire*, 95 F.3d at 1004 (same); *United States v. Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996) (same); *United States v. Bishop*, 66 F.3d 569, 577 (3d Cir. 1995), *cert. denied*, 516 U.S. 1066, 116 S. Ct. 750, 133 L.Ed.2d 698 (1996) (same); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (same); *see also Knutson*, 113 F.3d at 29-31 (upholding 18 U.S.C. § 922(o) solely on the basis of "congressional findings" and noting that *Lopez* "made clear that federal Commerce Clause legislation continues to merit a high degree of judicial deference"); *United States v. Monteleone*, 77 F.3d 1086, 1091-92 (8th Cir. 1996) (upholding 18 U.S.C. § 922(d) on the basis of "explicit Congressional findings").

2.

Contrary to the district court's holding, and the arguments of Morrison and Crawford, nothing in *Lopez* requires a different result.

In noting that § 922(q) "plow[ed] thoroughly new ground and represent[ed] a sharp break with the longstanding pattern of federal firearms legislation," *Lopez*, 514 U.S. at 563, 115 S. Ct. at 1632, the *Lopez* Court clearly indicated that in finding this statute unconstitutional it was enunciating a "limited holding." *Id.* at 568, 115 S. Ct. at 1634 (Kennedy, J., concurring). Although the Court refused to make an "additional expansion" to Congress's Commerce power to uphold § 922(q), and clarified that a regulated activity must "substantially affect interstate commerce," it did not overrule a single Commerce Clause precedent, signal a decrease in congressional power under the Commerce Clause, or abandon the "rational basis" test. *Id.* at 557-69, 115 S. Ct. at 1629-34; *see also United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997) ("*Lopez* did not alter our approach to determining whether a particular statute falls within the scope of Congress's Commerce Clause authority."); *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) (The *Lopez* Court "reaffirmed rather than overturned the previous half century of Commerce Clause precedent"), *cert. denied*, 519 U.S. 806, 117 S. Ct. 46-47, 136 L.Ed.2d 12 (1996).

In fact, in describing the history of the Court's Commerce Clause jurisprudence, *Lopez* forthrightly affirmed the modern expansive view of Congress's power under the Commerce Clause, and eschewed the more restrictive view of "commerce" based on formalistic

distinctions between "direct" and "indirect" effects on interstate commerce. *Id.* at 555, 115 S. Ct. at 1627- 28. The Court noted that "modern-era precedents . . . confirm that this power is subject to outer limits," *i.e.* it cannot "be extended so as to embrace effects upon interstate commerce so indirect and remote" as to "obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 555-59, 115 S. Ct. at 1628-29. But the Court expressly followed decades of "modern-era precedents" recognizing that a court's only role in considering a Commerce Clause challenge is "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557, 115 S. Ct. at 1629 (citing *Hodel*, 452 U.S. at 276-80, 101 S. Ct. at 2360-62; *Perez v. United States*, 402 U.S. 146, 155-56, 91 S. Ct. 1357, 1362, 28 L.Ed.2d 686 (1971)); *Katzenbach v. McClung*, 379 U.S. 294, 299-301, 85 S. Ct. 377, 381-82, 13 L.Ed.2d 290 (1964); and *Heart of Atlanta Motel*, 379 U.S. at 252-253, 85 S. Ct. at 354-55; see *also Lopez*, 514 U.S. at 574, 115 S. Ct. at 1637 (Kennedy, J., concurring) (*Lopez* does not "call in question" prior commerce clause "principles").[13]

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[13] Thus, it is unsurprising that "courts have resisted urgings to extend *Lopez* beyond § 922(q)." *United States v. Wall*, 92 F.3d 1444, 1448 (6th Cir. 1996), *cert. denied*, —- U.S. ——, 117 S. Ct. 690, 136 L.Ed.2d 613 (1997) (upholding 18 U.S.C. § 1955, which prohibits *inter alia* intrastate illegal gambling activities). Indeed, post-*Lopez* innumerable federal statutes have been challenged on Commerce Clause grounds but not a single one has been invalidated by a federal appellate court. *See, e.g., Hoffman*, 126 F.3d 575, 582-88 (upholding 18 U.S.C. § 248, which prohibits interference with access to reproductive health clinics); *United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir.), *cert. denied*, —- U.S. ——, 117 S. Ct. 507, 136 L.Ed.2d 398 (1996) (same); *Dinwiddie*, 76 F.3d at 919-21 (same); *Terry*, 101 F.3d at 1415-18 (same); *Wilson*,

Morrison and Crawford's reliance on *Lopez* falters not only because they ignore the limited nature of the *Lopez* holding but also because VAWA differs from § 922(q) in several important respects. In order to uphold VAWA, we need not "pile inference upon inference" as the Government asked the Court to do in *Lopez*. *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1633-34. Because Congress made no findings to support § 922(q) the Government was forced to argue that guns in

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73 F.3d at 679-88 (same); *Cheffer*, 55 F.3d at 1519-21 (same); *Wright*, 117 F.3d at 1268-1271 (upholding 18 U.S.C. § 922(o), which prohibits intrastate possession of machine gun, and noting that every circuit to consider the question had so held); *United States v. Crump*, 120 F.3d 462, 465-66 (4th Cir. 1997) (upholding 18 U.S.C.A. § 924(c)(1), which prohibits use and carrying of a firearm during and in relation to a drug trafficking crime, and noting "all of the circuits that have considered the question" had upheld the statute in the face of a *Lopez* challenge); *Olin Corp.*, 107 F.3d at 1509-10 (upholding CERCLA, 42 U.S.C. §§ 9601-9675); *United States v. Allen*, 106 F.3d 695, 700-1 (6th Cir. 1997), *cert. denied*, (1997) (upholding 21 U.S.C. § 860(a), the Drug Free School-Zones Act); *United States v. Hawkins*, 104 F.3d 437, 439-40 (D.C. Cir. 1997), *cert. denied*, —- U.S. ——, 118 S. Ct. 126, 139 L.Ed.2d 76 (1997) (same); *United States v. Wells*, 98 F.3d 808, 810-11 (4th Cir. 1996) (upholding 18 U.S.C. § 922(g), which prohibits possession of a firearm by a felon, and noting ten other circuits that had upheld its constitutionality under *Lopez*); *United States v. Genao*, 79 F.3d 1333, 1335-37 (2d Cir. 1996) (same); *United States v. Tisor*, 96 F.3d 370, 373-75 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140, 117 S. Ct. 1012, 136 L.Ed.2d 889 (1997) (upholding congressional authority to prohibit intrastate possession or sale of narcotics); *Leshuk*, 65 F.3d at 1111-12 (same); *Bramble*, 103 F.3d at 1479-82 (upholding the Eagle Protection Act, 16 U.S.C. § 668); *United States v. Michael R.*, 90 F.3d 340, 343-45 (9th Cir. 1996) (upholding 18 U.S.C. § 922(x)(2), which prohibits juvenile possession of a handgun); *United States v. Lomayaoma*, 86 F.3d 142, 144- 46 (9th Cir.), *cert. denied*, —- U.S. ——, 117 S. Ct. 272, 136 L.Ed.2d 196 (1996) (upholding the Indian Major Crimes Act, 18 U.S.C. § 1153).

schools affected commerce based upon several tenuous, multi-layered theories. *See id.* at 564, 115 S. Ct. at 1632; *Terry*, 101 F.3d at 1418 (quoting *Lopez*, 514 U.S. at 564, 115 S. Ct. at 1632) (For example, "gun possession near schools threatens the educational environment, which hampers the educational process, which creates a 'less productive citizenry' which adversely affects 'the Nation's economic well-being' and which in the end adversely affects interstate commerce."). VAWA, by contrast, regulates behavior—gender-based violent crime against women—which Congress has found substantially and gravely affects interstate commerce on the basis of abundant evidence. *Cf. Perez*, 402 U.S. at 154, 91 S. Ct. at 1362 (rejecting Commerce Clause challenge because "credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce"). To connect VAWA with interstate commerce, a court need not make any inferences—Congress itself has clearly established and documented that gender based violence against women substantially affects interstate commerce.

Additionally, unlike § 922(q), VAWA does not invade areas of traditional state control. The *Lopez* Court noted that "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1631 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 1720-21, 123 L.Ed.2d 353 (1993), and *United States v. Enmons*, 410 U.S. 396, 411-12, 93 S. Ct. 1007, 1015-16, 35 L.Ed.2d 379 (1973)). Title III of VAWA is not a criminal statute and

it displaces no state criminal law. *Cf. id.* (noting that statute in *Lopez* "displace[s] state policy choices" and "overrides legitimate state . . . laws"). Nothing in Title III prevents a victim of gender-based violence from bringing state criminal charges or pursuing state tort remedies, or affects how the state treats those claims.

In fact, far from displacing state law, Congress carefully designed VAWA to harmonize with state law and protect areas of state concern. Thus, VAWA references state criminal laws in defining a "crime of violence." *See* 42 U.S.C. § 13981(d)(2) (defining "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, and that would come within the meaning of *State* or Federal offenses described in section 16 of Title 18. . . ."") (emphasis added). Moreover, Congress expressly limited the reach of VAWA in further deference to traditional areas of state expertise such as divorce or child custody proceedings. *See* 42 U.S.C. § 13981(e) (4) (VAWA does not confer "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."). In sum, VAWA acts to supplement, rather than supplant, state criminal, civil, and family law controlling gender violence. The States are still free to "experiment[ ] to devise various solutions" to the problems of gender-based violence against

women. *Lopez*, 514 U.S. at 581, 115 S. Ct. at 1641 (Kennedy, J., concurring). [14]

In addition, unlike the statute invalidated in *Lopez*, VAWA does not occupy a legal territory where "States lay claim by right of history and expertise." *Id.* at 581-83, 115 S. Ct. at 1641 (Kennedy, J., concurring). Instead, VAWA legislates in an area—civil rights—that has been a federal responsibility since shortly after the Civil War. Furthermore, federal action is particularly appropriate when, as here, there is persuasive evidence that the States have not successfully protected the rights of a class of citizens. In passing VAWA Congress made extensive and convincing findings that state law had failed to successfully address gender-motivated violence against women. Congress concluded that:

> Other State remedies have proven inadequate to protect women against violent crimes motivated by gender animus. Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination. Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting

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[14] In fact, State Attorneys General from forty-one states supported the passage of VAWA. They told Congress: "Our experience as attorneys general strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the Senate Comm. on the Judiciary*, 103d Cong. 34-36 (1993) (Letter from State Attorneys General).

> women are often treated less seriously than crimes affecting men. [C]ollectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.

S. Rep. No. 103-138, at 49 (footnotes omitted).[15] In VAWA, Congress has passed a civil rights law, a quintessential area of federal expertise, in response to "existing bias and discrimination in the criminal justice system." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

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[15] The studies referred to in the above quotation were largely State-sponsored, including the following: Administrative Office of the California Courts Judicial Counsel, *Achieving Equal Justice for Women and Men in the Courts* (1990); Colorado Supreme Court Task Force on Gender Bias in the Courts, *Gender & Justice in the Colorado Courts* (1990); *Connecticut Task Force on Gender Justice and the Courts* (1991); Florida Supreme Court Gender Bias Study Commission, *Report* (1990); Supreme Court of Georgia, *Gender and Justice in the Courts* (1991); Illinois Task Force, *Gender Bias in the Courts* (1990); Maryland Special Joint Committee, *Gender Bias in the Courts* (1989); Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, *Final Report* (1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *Final Report* (1989); Nevada Supreme Court Gender Bias Task Force, *Justice For Women* (1989); New Jersey Supreme Court Task Force, *Women in the Courts* (1984); New York Task Force on Women in the Courts, *Report* (1986); *Rhode Island Supreme Court Committee on Women in the Courts* (1987); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* (1990); Vermont Supreme Court and Vermont Bar Association, *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* (1991); Washington State Task Force, *Gender and Justice in the Courts* (1989); Wisconsin Equal Justice Task Force, *Final Report* (1991). *See* S. Rep. No. 103-138, at 49 n.52.

Nonetheless, Morrison and Crawford argue that *Lopez* requires a different result. They note that § 922(q) had "nothing to do with 'commerce'" and was not "an essential part of a larger regulation of economic activity," *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1631, and assert that VAWA similarly regulates a non-economic activity and is therefore beyond Congress's Commerce Clause authority. This argument, however, misreads both *Lopez* and VAWA.

First, as Morrison and Crawford concede, *Lopez* clearly does not hold that a statute must regulate economic activity to pass muster under the Commerce Clause. Such a holding could not be squared with past Commerce Clause jurisprudence, or *Lopez* itself. *Lopez* quoted *Wickard v. Filburn*'s famous statement that "[e]ven if appellee's activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S. Ct. 82, 89, 87 L.Ed. 122 (1942) (emphasis added), *quoted in Lopez*, 514 U.S. at 556, 115 S. Ct. at 1628. Similarly, the *Lopez* Court relied on *Heart of Atlanta Motel*, 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 and *Katzenbach*, 379 U.S. at 294, 85 S. Ct. at 379. *See Lopez*, 514 U.S. at 557-563, 115 S. Ct. at 1628-32. These cases involved the public accommodation provisions of the Civil Rights Act of 1964, 78 Stat. 243 (codified as amended at 42 U.S.C. § 2000a (1994)), not an "economic" regulation but a civil rights statute, which like VAWA prohibits acts motivated by

bias that have a substantial effect on interstate commerce.[16]

Furthermore, the actual basis of the *Lopez* holding, which Morrison and Crawford attempt to ignore, undermines their argument as to the importance of "economic activity." The *Lopez* Court did not strike down § 922(q) because it regulated non-economic activity. The Court invalidated § 922(q) because neither Congress nor the Government convinced the Court that there was a rational basis for concluding that possession of a gun in a school zone substantially affected interstate commerce. *Lopez*, 514 U.S. at 561-67, 115 S. Ct. at 1631-33. Here, however, there clearly is a rational basis for

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[16] Thus, we follow our sister circuits and hold that *Lopez* does not narrow Congress's Commerce Clause authority solely "to the regulation of commercial actors, and not private individuals who interfere with commercial activities in interstate commerce. To the contrary, the Court . . . [has upheld] statutes which penalize behavior substantially affecting interstate commerce without regard to the actor's commercial or private status." *Cheffer*, 55 F.3d at 1520 n. 6; *see also Knutson*, 113 F.3d at 30 (same); *United States v. Hicks*, 106 F.3d 187, 189 (7th Cir. 1997), *cert. denied*, 520 U.S. 1258, 117 S. Ct. 2425, 138 L.Ed.2d 188 (1997) (same); *Dinwiddie*, 76 F.3d at 920-21 (same); *Terry*, 101 F.3d at 1417 (same); *Wilson*, 73 F.3d at 684-85 (same). As Chief Judge Posner recently noted, the fact that a law was not explicitly meant "to increase the gross national product by removing a barrier to free trade, but rather to protect personal safety and property rights, is irrelevant [because] . . . Congress can regulate interstate commerce for any lawful motive." *Soderna*, 82 F.3d at 1374 (citing *Heart of Atlanta Motel*, 379 U.S. at 256-57, 85 S. Ct. at 356-58). The Supreme Court itself has recognized, "[a]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives." *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 258, 114 S. Ct. 798, 804, 127 L.Ed.2d 99 (1994).

concluding that gender-based violence against women does precisely this.

Even if the regulated activity itself had to have an economic nexus, VAWA, unlike § 922(q), regulates an activity that is "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561-63, 115 S. Ct. at 1631. As recounted above, Congress recognized the enormous impact that violence against women has on women in the workplace, and as such, VAWA, along with Title VII, can be seen as a part of a larger regulatory effort to eliminate gender-based violence as a barrier to job opportunities. Congress found that "current law provides a civil rights remedy for gender crimes committed in the workplace, but not for crimes of violence motivated by gender committed on the street or in the home." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. VAWA was meant to fill that gap.

Morrison and Crawford's reliance on the fact that VAWA, like § 922(q), does not have a jurisdictional restriction is unpersuasive for similar reasons. *Lopez* does not require that a statute contain a jurisdictional limit in order to pass Commerce Clause scrutiny. *See Olin Corp.*, 107 F.3d at 1510; *United States v. Rybar*, 103 F.3d 273, 285 (3rd Cir. 1996), *cert. denied*, —- U.S. ——, 118 S. Ct. 46, 139 L.Ed.2d 13 (1997); *Terry*, 101 F.3d at 1418; *Wall*, 92 F.3d at 1449 n. 11; *Wilson*, 73 F.3d at 685. "If a jurisdictional element were critical to a statute's constitutionality, the Court in *Lopez* would not have gone on to examine the Government's proffered rationales for the constitutionality of the gun possession statute." *Terry*, 101 F.3d at 1418.

The core teaching of *Lopez* is simply that Congress must ensure that legislation enacted pursuant to its Commerce Clause authority reaches only activities that "substantially affect interstate commerce." A jurisdictional element or Congressional findings assist a court in determining whether a regulated activity substantially affects interstate commerce. But neither is necessary for constitutional validity. *See Wright*, 117 F.3d at 1269 (Congress need not "place a jurisdictional element" in a statute or make "legislative findings connecting the regulated activity to interstate commerce."). Although Congressional findings are not required, here we do have abundant legislative findings evidencing that Congress did indeed ensure that the regulated activity substantially affected interstate commerce. As noted above, we recently relied on far less detailed Congressional findings to uphold a statute that did not regulate economic activities and had no jurisdictional element. *Leshuk*, 65 F.3d at 1111-12.

Finally, our holding that Congress had a rational basis to conclude that violence against women has a substantial effect on interstate commerce does not mean, as Morrison and Crawford contend, that acting pursuant to the Commerce Clause Congress can reach any activity, including divorces, child-support, and "diet and exercise habits." This argument ignores the years of hearings on the need for VAWA and the reams of congressional findings made in support of VAWA. It belittles the seriousness of the national problem that discriminatory violence against women presents. It overlooks VAWA's explicit deference to State expertise: the statute's express restriction to gender-motivated violent crimes is defined in part in reference to state law, and it prohibits jurisdiction over divorce,

alimony, and child custody matters. *See* 42 U.S.C. § 13981(e)(4).

Most importantly, this argument disregards the ineludible fact that our role is simply to determine if Congress had a rational basis for concluding that a regulated activity "substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 560, 115 S. Ct. at 1630. After four years of hearings and extensive legislative findings, Congress has adjudged that violence against women substantially affects interstate commerce. It is "abundantly clear that our job in this case is not to second-guess the legislative judgment of Congress that" violence against women "substantially affects interstate commerce, but rather to ensure that Congress had a rational basis for that conclusion." *Bishop*, 66 F.3d at 577. In light of Congress' findings, well supported by testimony and data, we hold that Congress had such a rational basis in enacting VAWA.

We note that it is apparent that Congress took great care to detail its findings and support its conclusion that VAWA was within its commerce authority. The breadth of the record itself manifests that Congress understood its duty to act only within its enumerated powers in this case, and took that duty seriously. As the Supreme Court explained in *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650, 64 S. Ct. 1196, 1200, 88 L.Ed. 1509 (1944):

> [Whether] the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the

> Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised.

See also Lopez, 514 U.S. at 578, 115 S. Ct. at 1639 (Kennedy, J., concurring) (It is Congress' and the President's "obligation to preserve and protect the Constitution in maintaining the federal balance . . . in the first and primary instance."). In following our "[s]trictly confined" duty in this case, we must conclude that Congress has in no way "exceeded limits allowable in reason for the judgment which it has exercised." *Polish Nat'l Alliance*, 322 U.S. at 650, 64 S. Ct. at 1200. Congress acted within its Commerce Clause authority in enacting VAWA.[17]

IV.

To summarize, we hold that Brzonkala's complaint states a claim under Title IX against Virginia Tech, and under the Violence Against Women Act against Morrison and Crawford. Further, we hold that the Com-

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[17] Once a court has decided that a Congressional act is within the commerce power the only remaining question is whether "the means chosen by" Congress are "reasonably adapted to the end permitted by the Constitution." *Hodel*, 452 U.S. at 276, 101 S. Ct. at 2360 (quoting *Heart of Atlanta Motel*, 379 U.S. at 262, 85 S. Ct. at 360). No party contests this point, and we hold that VAWA's civil remedy is well within appropriate congressional means.

merce Clause provides Congress with authority to enact the Violence Against Women Act. Accordingly, the judgments of the district court dismissing both the Title IX and Violence Against Women Act claims are reversed and the case is remanded for further proceedings.

No. 96-1814—*REVERSED AND REMANDED.*

No. 96-2316—*REVERSED AND REMANDED.*

LUTTIG, Circuit Judge, dissenting:

Fully aware of the importance of the matter before us today, I would unhesitatingly affirm the judgment below on the essential reasoning set forth by the district court. *Brzonkala v. Virginia Polytechnic & State University*, 935 F.Supp. 779 (W.D. Va. 1996). Judge Kiser's lengthy opinion is an excellent legal analysis of the constitutionality of the Violence Against Women Act under Article I, § 8, cl.3 of the Constitution. That analysis is thorough, scholarly, and, most important, abidingly faithful to the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995). The district court's analysis describes in detail the Supreme Court's new analytical framework for addressing Commerce Clause challenges, and meticulously and dispassionately applies the principles and reasoning from *Lopez* in addressing the challenge to the legislation at issue in this case. *Compare Hoffman v. Hunt*, 126 F.3d 575, 1997 WL 578787 (4th Cir. 1997) (same).

The district court's careful opinion brings into sharp relief not only the analytical superficiality of the majority's opinion, but also the majority's manifest mis-

reading of the Supreme Court's historically significant *Lopez* decision and, therefore, its fundamental misunderstanding of the import of that decision and its implications for the Violence Against Women Act.

Among the more profound of its errors, the majority, in complete disregard of Lopez, does not include even a single sentence—not one—of the "independent evaluation" of the effect on interstate commerce of the Violence Against Women Act required under that decision. *See Lopez*, 514 U.S. at 562, 115 S. Ct. at 1631. Ignoring entirely the overarching change in Commerce Clause analysis wrought by *Lopez*, the majority merely recites several statements from House and Senate committees on the general problem of violence against women and the effect of that violence on the national economy, together with a sentence from a House Report stating that violence against women substantially affects interstate commerce (incidentally, never mentioning that the Senate, as opposed to the House, did not conclude that such violence substantially affects interstate commerce) and then simply states, without more, that the Act is constitutional.

The majority thus reaches its conclusion that the Violence Against Women Act is a constitutional exercise of the Commerce Clause power through application of a principle of absolute judicial deference to a committee finding—precisely what the Supreme Court held in *Lopez* was no longer appropriate in the review of Commerce Clause challenges to federally enacted statutes, even for findings by the full Congress. *See*, *e.g.*, *Lopez*, 514 U.S. at 557 n. 2, 115 S. Ct. at 1629 n. 2 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate

commerce does not necessarily make it so. [W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." (citations and internal quotation marks omitted)).

The majority's elevation of a committee's finding not merely to preeminence among the constitutionally relevant considerations, but to a position as dispositive of the constitutional inquiry, is not at all inadvertent; to the contrary, it is quite intentional. In fact, trumpeting a misplaced reliance on *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995), the majority is at pains throughout its opinion to emphasize that it rests its conclusion entirely on the "finding" in the House Report, which it ascribes to the Congress as a whole and then accepts wholly and uncritically:

> After four years of hearings and consideration of voluminous testimonial, statistical, and documentary evidence, Congress made an unequivocal and persuasive finding that violence against women substantially affects interstate commerce. . . . *Accordingly*, whatever one's doubts as to whether VAWA represents a good policy decision, we can only conclude that Congress' findings are grounded in a rational basis.

Ante at 968 (emphasis added; citation omitted); *see also id.* at 966 (describing *Leshuk* as "rejecting a *Lopez* challenge to the 'Comprehensive Drug Abuse Prevention and Control Act' *and beginning and ending our analysis by relying totally upon Congress's 'detailed findings' on the interstate commerce effects*" (emphasis

added)); *id.* at 968 (again comparing majority's conclusion with that in *Leshuk* and characterizing *Leshuk* as a case where, "*[w]ithout further ado* we 'relied upon the[ ] [congressional] findings' to hold the Commerce Clause authorized Congress to enact this statute" (quoting *Leshuk*, 65 F.3d at 1112; emphasis added)); *id.* at 973 ("Although Congressional findings are not required, here we do have abundant legislative findings evidencing that Congress did indeed ensure that the regulated activity substantially affected interstate commerce. As noted above, we relied *exclusively* on far less detailed Congressional findings to uphold a statute that did not regulate economic activity and had no jurisdictional element." (Emphasis added; citation to *Leshuk* omitted)).

The majority's wholesale deference to a committee finding would at least be understandable if that committee had made extensive findings deserving of deference. However, the majority ultimately sustains the constitutionality of the Act literally on the basis of a single sentence appearing in that committee report, which sentence is, itself, entirely conclusory.

After properly concluding that it cannot rely upon Congress' Section 5 findings in support of its Commerce Clause analysis,[1] and after recognizing that the bulk of

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[1] For its unexplained conclusion that violence against women has a substantial effect on interstate commerce and therefore is a valid exercise of Congress' Commerce Clause power, the majority properly does not rely on the findings Congress made to justify VAWA under Section 5 of the Fourteenth Amendment. Thus, the majority distinguishes between the findings made in support of Congress' exercise of its Section 5 power and the findings made in

its recited findings bear only on "the enormity of the problem" of domestic violence against women, not on that problem's effect on interstate commerce, *see ante* at 966-68, the majority is left with but a single conclusory sentence in the Report of one House to which to defer in sustaining VAWA under Article I. *See ante* at 967 ("crimes of violence motivated by gender have a substantial adverse effect on interstate commerce. . . ."). [2] This lone conclusory sentence constitutes the

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support of Congress' exercise of its Commerce Clause power, as does the Department of Justice. *Compare* Br. of Intervenor-Appellant United States at 4, 6-8 (detailing congressional findings on the "Impact on the National Economy and Interstate Commerce"), *with id.* at 9-16 (detailing congressional findings on the "Bias in State Judicial Systems"); *compare also id.* at 965-970 (arguing in reliance upon findings recited at 4-8 that VAWA is a valid exercise of Congress' power under the Commerce Clause), *with id.* at 961-965 (arguing in reliance upon findings recited at 9-16 that VAWA is a valid exercise of Congress' power under Section 5). It may be, as the Department of Justice contends, that congressional findings that the civil rights of women are being violated bear on the question of whether a statute impermissibly encroaches on traditional state functions. *See* Br. for Intervenor-Appellant United States at 32 ("An exercise of Commerce Clause power cannot plausibly be invalidated *on the basis of federalism concerns* where the declared purpose of the statute, supported by extensive legislative evidence, is to secure the civil rights the states have failed to protect." (emphasis added)). But, as the Department and the majority both recognize, it would be untenable to hold that such findings even bear on, much less largely resolve, the threshold question of whether violence against women has an effect on interstate commerce at all.

[2] The majority cites to only one other sentence from the four years of congressional debate in support of its holding, and that sentence from a Senate committee report does not even purport to find that gender-motivated violence *substantially* affects interstate commerce (although the majority seems to presume that it does). *See id.* at 967 ("Gender-based crimes and the fear of gender-

entirety of the "mountain of evidence," *ante* at 964, the "reams," *id.* at 973, the "voluminous," *id.* at 965, the "copious," *id.* at 966 n. 9, the "detailed," *id.* at 966, the "unequivocal," *id.* at 968, the "abundant," *id.* at 973, and the "persuasive," *id.* at 968, congressional findings upon which the majority upholds VAWA. This one sentence is the basis upon which the majority concludes that "it is apparent that Congress took great care to detail its findings and support its conclusions that VAWA was within its commerce authority." *Id.* at 973.

It should go without saying that this one sentence is functionally no different from a complete absence of express congressional findings. *See Lopez*, 514 U.S. at 562, 115 S. Ct. at 1631. This single conclusory sentence no better "enables [the court] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce," *id.* at 563, 115 S. Ct. at 1632, than would have no statement at all. Rather than the "paradigm of judicial restraint" as the majority asserts, *ante* at 965 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 113 S. Ct. 2096, 2101, 124 L.Ed.2d 211 (1993)), deference to this kind of "finding" is judicial activism merely parading as restraint.

Related to its reflexive acceptance of the committee's conclusory finding as to the effect on interstate commerce of domestic violence against women, the ma-

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based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."). The sentence speaks more to the effects of such violence on the economy in general than on interstate commerce, in any event.

jority, of necessity, includes scarcely even a reference to the majority opinion in Lopez *in reaching its conclusion that the Violence Against Women Act is constitutional.* Only after concluding that the Act is constitutional does the majority perfunctorily address the bulk of the Court's most significant pronouncements on the Commerce Clause. *See, e.g.*, *ante* at 969 (noting, after holding Act constitutional on the basis of the Committee findings alone, that "nothing in *Lopez* requires a different result"). Thus, the majority upholds the Violence Against Women Act without so much as a mention of the economic or noneconomic character of the legislation—much less the quite different constitutional analysis required depending upon which type of statute is at issue;[3] the presence or absence of a jurisdictional element that would ensure case-by-case that the necessary effect on interstate commerce exists; or the consequences of its holding for the "first principles" of divided powers, which the Supreme Court believed so important in the constitutional equation that it began and ended its opinion with a full discussion of them, *compare* Br. for Intervenor-Appellant United States at 19 (noting that principles of federalism were of "a critical concern to

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[3] So far afield is the majority's reasoning from that of the Supreme Court in *Lopez*, that the majority all but holds that the character of legislation as "economic" or "noneconomic" is irrelevant under *Lopez*. See *ante* at 972 ("The *Lopez* Court did not strike down § 922(q) because it regulated non-economic activity. The Court invalidated § 922(q) because neither Congress nor the Government convinced the Court that there was a rational basis for concluding that possession of a gun in a school zone substantially affected interstate commerce." (citation omitted)); *id.* ("Even if the regulated activity itself had to have an economic nexus . . .").

the Court in *Lopez*"). Consistent with the majority's view of *Lopez* as a fact-specific case of little significance, these pivotal considerations are, and plainly so, consigned to afterthought.

The majority opinion is, it should come as no surprise, categorically inconsistent with our court's recent carefully written and analyzed opinion in Hoffman v. Hunt, 126 F.3d 575, 586-88, *wherein we upheld the Freedom of Access to Clinic Entrances Act of 1994 ("FACE").* Indeed, the majority must resort to mischaracterization of that opinion in order to avoid the evident inconsistency with its own opinion. The majority states, in transparent legerdemain, that the court in *Hoffman* reviewed the congressional reports "to *uphold*" the Freedom of Access to Clinics Act. *Ante* at 968; *see also id.* (stating that "similarly" to *Leshuk*, *Hoffman* relied wholly on Congress' findings). However, in *Hoffman* we did not review the congressional reports to *uphold* the Act; we merely reviewed them, together with the other factors from *Lopez*, particularly the close and direct connection of the regulated conduct with an economic activity, *in upholding* the Act. The difference is obvious. Indeed, this is precisely the significance of *Lopez*. After *Lopez*, it is clear that the courts are to undertake an independent review of the relationship between the regulated activity and interstate commerce, not simply to rubber-stamp Congress' findings as to that relationship, as the majority does.

Similarly, the majority states that "[b]ecause Congress had made these persuasive findings we concluded [in *Hoffman*] that we did not need to 'pile inference upon inference' to find a substantial effect on interstate commerce." *Ante* at 968. Again, however, we did not

reason in this way at all. We did not say that we did not need to pile inference upon inference *because Congress had made the findings*; rather, and quite differently, we said that the piling of inferences was unnecessary because *our own independent determination* had revealed that there existed a real and substantial connection between the conduct regulated under FACE and interstate commerce. Again, the difference between *Hoffman* and the majority opinion, and, more importantly, between the majority opinion and *Lopez*, is obvious.

Finally, in powerful irony, at the same time that the majority decides the Commerce Clause challenge to VAWA with barely a mention of the analysis carefully laid out by the Supreme Court in Lopez, *the majority does not include even a single sentence of discussion of the district court's exhaustive analysis that it summarily reverses—an analysis which actually is, in contrast to the majority's opinion, scrupulously faithful not only to Supreme Court precedent, but to our Circuit precedent as well.*

In short, the majority opinion reads, as intended, as if *Lopez* were never decided, holding for our Circuit, explicitly on the authority of Judge Kravitch's opinion in *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997), and implicitly on the reasoning advocated by the dissenting Justices in *Lopez*, that "'*Lopez* did not alter our approach to determining whether a particular statute falls within the scope of Congress's Commerce Clause authority.'" *Ante* at 969. Indeed, as the majority tacitly acknowledges, with understandable reluctance, it views *Lopez*, the most significant Commerce Clause decision in more than half a century, as an

aberration, a case limited in its reach to section 922(q), of Title 18, of the United States Code. *See ante* at 969 n. 13 ("[I]t is unsurprising that 'courts have resisted urgings to extend *Lopez* beyond § 922(q).'" (citations omitted)).

I suspect that, even in its discretion, the Supreme Court would not allow today's decision to stand, not only because of the decision's bold intransigence in the face of the Court's recent decision, but also because the Commerce Clause challenge to the instant statute pristinely presents the Court with the logical next case in its considered revisitation of the Commerce Clause. Because today's decision wholly ignores the Supreme Court's analysis in *Lopez* and conflicts directly with our recent post-*Lopez* decision in *Hoffman v. Hunt*, however, I have every hope that our own court will obviate the need for such further review.

I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
W.D. VIRGINIA
ROANOKE DIVISION

Civil Action No. 95-1358-R

CHRISTY BRZONKALA, PLAINTIFF

v.

VIRGINIA POLYTECHNIC AND STATE UNIVERSITY, ET AL., DEFENDANTS

July 26, 1996

MEMORANDUM OPINION

KISER, Chief Judge.

On March 1, 1996, Christy Brzonkala filed an amended complaint alleging violations of Title IX of the Education Amendment Act, 20 U.S.C. § 1681, *et seq.*, of Title III of the Violence Against Women Act, 42 U.S.C. § 13981 ("VAWA"), and of various state laws. Brzonkala brought claims against Virginia Polytechnic Institute & State University ("VPI"), William Landsidle in his capacity as Comptroller of the Commonwealth, and three VPI football players, Antonio Morrison, James Crawford, and Cornell Brown.

I dismissed the claims against VPI, William Landsidle, and Cornell Brown, and now I will consider the claims against Morrison and Crawford. Only the VAWA and some state law claims remain.

I. Alleged Facts

Brzonkala is an adult female who resides in Fairfax, Virginia. She attended VPI where she was a "student athlete" and a prospect for the women's softball team. Morrison and Crawford are adult males. They attend VPI where they are members of the all-male football team. On the night of September 21, 1994 and the morning of the next day, Brzonkala was sexually assaulted in a room on the third floor of her dormitory by two men whom she and Hope Handley, another female student, had met less than a half-hour earlier and whose identities she knew only by given names and by their status as football team members. Brzonkala alleges that the two men forced her to have sexual intercourse by threat and intimidation and through the use of Brzonkala's "mental incapacity and physical helplessness." She alleges that the two men's acts "were motivated wholly by discriminatory animus toward her gender and were not random acts of violence." Brzonkala reported that she was not inebriated at the time of the assaults. About five months later, Brzonkala learned that the assailants were Morrison and Crawford.

On September 21, Brzonkala, Handley, Morrison, and Crawford were in a room on the third floor of Brzonkala's dormitory. Handley and Crawford left the room following fifteen minutes of conversation, and Morrison immediately requested intercourse with Brzonkala.

Brzonkala audibly told Morrison "no" twice. When Brzonkala rose to leave, Morrison forced her face-up onto a bed, pushed her down by her shoulders, and disrobed her. Morrison pinned her down by her elbows with his hands, pressed his knees against her legs, and forced her to submit to vaginal intercourse. Brzonkala attempted to push Morrison off. Then, before Brzonkala could recover, Crawford came back into the room, exchanged places with Morrison, and forced Brzonkala to submit to vaginal intercourse by pinning down her arms and placing his knees against her legs. Again before Brzonkala could recover, Morrison exchanged places with Crawford and forced Brzonkala to submit to vaginal intercourse a third time. Afterwards, Morrison said to Brzonkala, "You better not have any fucking diseases." Neither Morrison nor Crawford used a condom.

In February 1995, Brzonkala recognized Morrison and Crawford as the two men who forced her to submit to intercourse. Prior to this identification, Morrison announced publicly in the dormitory's dining hall and in the presence of VPI student Charlotte Wachter, "I like to get girls drunk and fuck the shit out of them." At the end of April 1995, Brzonkala filed a complaint against Morrison and Crawford under VPI's Sexual Assault Policy. After Brzonkala filed her complaint, she learned that a VPI student overheard an unidentified male VPI athlete advise Crawford that he should have "killed the bitch."

In the first hearing, Morrison admitted the sexual contact and admitted that Brzonkala told him "no" twice. Crawford confirmed that Morrison had sexual conduct with Brzonkala and testified that Brzonkala

was "really drunk" when she arrived in the room. Crawford denied that he had sexual contact with Brzonkala. The VPI judicial committee found Morrison guilty of sexual assault and suspended him from school for two semesters. The committee found insufficient evidence to take action against Crawford. In May 1995, Morrison appealed the committee's sanction, and an appeals officer upheld the sanction.

During a second hearing, the judicial committee found Morrison guilty of abusive conduct and reimposed the sanction of an immediate two-year suspension. Morrison appealed the result, and, without notice to Brzonkala, VPI set aside the sanction against Morrison. Morrison returned to VPI for the Fall 1995 semester. Brzonkala learned through a November 30, 1995 newspaper article that the judicial committee at the second hearing had actually found Morrison guilty of a reduced charge of "using abusive language." Because Morrison would be present on the VPI campus during the Fall 1995 semester, Brzonkala feared for her personal safety and canceled her plan to return to VPI for the Fall semester.

II. Statute

42 U.S.C. § 13981. Civil Rights

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of

gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

All persons (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section——

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means——

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures

(1) Limitation

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

(2) No prior criminal action

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.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

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

III. Issues

Two issues are involved: (1) whether the complaint sufficiently states a claim by Fed. R. Civ. P. 12(b)(6) standards, and, if so, (2) whether VAWA is constitutional.

IV. Whether Brzonkala States a Claim

A. Standard

Rule 12(b)(6) dismissals are generally disfavored and only granted when it appears beyond doubt that a plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U. S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957). I may only test plaintiff's complaint for any legal deficiency and must construe the factual allegations in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U. S. 232, 94 S. Ct. 1683, 40 L.Ed.2d 90 (1974); *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991), *cert. denied*, 503 U. S. 936, 112 S. Ct. 1475, 117 L.Ed.2d 619 (1992).

B. Analysis

The sticking point in determining if Brzonkala sufficiently stated a VAWA claim is whether she has sufficiently alleged that the rape was "motivated by gender." A crime "motivated by gender" is defined as a crime "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." *See* 42 U.S.C. § 13981(d)(1).

Defendants argue that Brzonkala failed the liberal pleading standards of Fed. R. Civ. P. 8. "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief, ..." Fed. R. Civ. P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e)(1).

The legislative history behind VAWA sheds some light on the proof requirements which, in turn, shed some light on the pleading requirements. "Proof of 'gender-motivation' under [T]itle III should proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws. Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event." S. Rep. No. 197, 102d Cong., 2d Sess. 50 (1991). "Bias, in short, can be proved by circumstantial as well as indirect evidence." S. Rep. No. 138, 103d Cong., 1st Sess. 52 (1993).

> Generally accepted guidelines for identifying hate crimes may also be useful in assessing whether the circumstances show gender-motivation. The following characteristics are used to determine whether a crime is bias related: language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense. . . .

S. Rep. No. 197, 102d Cong., 2d Sess. 50 n. 72. The statute in question "requires subjective proof on a case-by-case basis that the criminal was motivated by a bias against the victim's gender. Whether a particular crime is, in fact, gender-motivated will be a question of fact for the court or jury to decide. . . ." S. Rep. No. 138, 103d Cong., 1st Sess. 49-50.

In support of her VAWA claim, Brzonkala makes the conclusory statement that Morrison and Crawford's actions "were motivated wholly by discriminatory animus toward her gender and were not random acts of violence." Such a conclusory statement is likely insuffi-

cient to state a claim. *Cf. Simpson v. Welch*, 900 F.2d 33 (4th Cir. 1990). However, Brzonkala has alleged other facts that support this conclusory statement.

Brzonkala alleges that she had met Morrison and Crawford less than a half-hour before she was raped, that Morrison and Crawford participated in a gang rape of Brzonkala, Morrison having sex with her one time before and one time after Crawford had sex with her, that neither Morrison nor Crawford used a condom, that, after raping her the second time, Morrison stated to Brzonkala, "You better not have any fucking diseases," and finally that, within about five months after the rapes, Morrison announced publicly in the dormitory's dining hall and in the presence of at least one woman, "I like to get girls drunk and fuck the shit out of them."

I need not decide whether the allegation of the rapes alone is sufficient to state a claim. All rapes are not the same, and the characteristics of the rapes here alleged, when compared to other rapes, indicate that gender animus more likely played a part in these rapes than in some other types of rape. First, the assault involved a gang rape. While any rape is egregious, all other factors the same, gang rape generally is more egregious than one-on-one rape. Where, as here, two men rape one woman, this indicates a conspiracy of disrespect for that woman. Second, these rapes fall somewhere in between stranger rape and date rape, and are probably closer to stranger rape. Again, while any rape is egregious, stranger rape and rapes such as the one in question generally are more egregious than date rape. Additionally, stranger rape generally more likely than date rape involves gender animus. For example, date

rape could involve a misunderstanding and is often less violent than stranger rape. By the facts alleged, the case at hand does not involve any misunderstanding. Date rape could also involve a situation where a man's sexual passion provokes the rape by decreasing the man's control. Here there is no indication that sexual passion caused Morrison to initiate intercourse. Finally, date rape could involve in part disrespect for the victim as a person, not as a woman; in date rape the perpetrator knows the victim's personality to some extent. In the case at hand, the facts indicate that Morrison and Crawford had little if any knowledge of Brzonkala's personality. Therefore, by process of elimination, an inference of gender animus is more reasonable in this situation than in some other rapes.

In Morrison's case, two facts other than the characteristics of the rapes point to gender animus. After having intercourse with Brzonkala for the second time, Morrison stated, "You better not have any fucking diseases." While the relevance of this to gender animus is questionable, this further evidences the disrespect that Morrison had for Brzonkala, irrespective of any knowledge of her personality. More importantly and more relevant to gender animus, Morrison stated at a later date, in the presence of at least one woman, "I like to get girls drunk and fuck the shit out of them." Although Morrison did not state that he likes to rape women, his statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent. This statement indicates disrespect for women in general and connects this gender disrespect to sexual intercourse, and, at least, raises an issue to be pursued in discovery. Although the statement is relevant without such an inference, the

reasonable inference that Brzonkala was intoxicated at the time of the rapes further links Morrison's statement to the alleged rapes at issue. While Brzonkala alleges that she "reported that she was not inebriated at the time of the assaults," she also alleges that Morrison raped her "through the use of [her] mental incapacity." Crawford stated that Brzonkala was "really drunk."

Congress obviously intended this statute to apply to rapes motivated by gender bias. Morrison's actions outwardly evidence gender animus more than many, if not most, situations of rape (at least before discovery has revealed any other evidence of gender animus). The purpose of the statute would be eviscerated if, to state a claim, a plaintiff had to allege, for example, that the defendant raped her and stated, "I hate women." Defendants indicate that plaintiffs must allege facts such as an ongoing series of sexual assaults by the defendant. But, as plaintiff points out, she has not had opportunity to take discovery to uncover any possible prior similar assaults. Additionally, I question whether the alleged sexual assault plus a statement indicating that Morrison enjoys having intercourse with women against their sober consent is any less indicative of gender animus than an allegation of a series of sexual assaults.

Therefore, at least against Morrison, Brzonkala has successfully stated a claim for a violation of 42 U.S.C. § 13981. The characteristics of the rape combined with Morrison's statements are sufficient at least to meet the minimal federal pleading requirements. Whether Brzonkala can prove the allegations in her complaint by a preponderance of the evidence is not currently an issue before the Court. Deciding whether a claim is

stated against Crawford is unnecessary considering my decision on the constitutionality of VAWA.

V. Whether VAWA (42 U.S.C. § 13981) Is Constitutional

If VAWA is constitutional, it must be based either on the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment.

A. Commerce Clause

1. Commerce Power Generally

Article I of the U. S. Constitution authorizes Congress "[t]o regulate commerce . . . among the several States. . . ." U. S. Const., art. I, § 8, cl. 3. Plaintiff [1] argues that VAWA is constitutional because it addresses conduct that substantially affects interstate commerce. In *United States v. Lopez*, [514] U. S. [549], 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court considered the constitutionality of former 18 U.S.C. § 922(q), the Gun-Free Zone Act of 1990, which forbade "'any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Id.* at ——, 115 S. Ct. at 1626 (quoting former 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)). Specifically, the Court considered whether this act was a permissible use of Congress's commerce power.

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[1] From this point on, "plaintiff" may refer to Brzonkala's initial counsel, the Government, which intervened on Brzonkala's behalf, amici, or some or all of the above.

In answering this issue, the Court considered important that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' "*Id.* at ——- ——, 115 S. Ct. at 1628-1629 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37, 57 S. Ct. 615, 624, 81 L.Ed. 893 (1937)). The Court has "heeded that warning" and has "undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at ——, 115 S. Ct. at 1629 (citing among other cases *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276-280, 101 S. Ct. 2352, 2360-2362, 69 L.Ed.2d 1 (1981)). The Supreme Court has not "'declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.'" *Id.* (quoting *Maryland v. Wirtz*, 392 U. S. 183, 197 n. 27, 88 S. Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020 (1968)). "Rather, '[t]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Id.* (quoting *Wirtz*, 392 U. S. at 197 n. 27, 88 S. Ct. at 2024 n. 27).

Under its commerce power, Congress may regulate three broad categories of activity. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things

in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress may regulate those activities having a substantial relation to interstate commerce. *Id.* at —— - ——, 115 S. Ct. at 1629-1630 (citations omitted). In *Lopez*, the Court concluded that, in order to qualify for the third category, the regulated activity must "substantially affect" interstate commerce. *Id.* at ——, 115 S. Ct. at 1630.

2. First Two Categories

As in *Lopez*, in the case at hand the first two categories can be easily eliminated. VAWA is not "a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce." *Cf. Lopez*, 514 U. S. at ——, 115 S. Ct. at 1630. Also, VAWA is not a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Cf. id.* Admittedly women often travel between states, as do their abusers and assailants, but certainly more is required to qualify for the commerce power. Therefore, if VAWA is a permissible exercise of power under the Commerce Clause, it must qualify for the third category: it must regulate an activity that has a substantial effect on interstate commerce.

3. *Lopez's* Analysis of Substantial Effect on Interstate Commerce

The effects-analysis of the majority decision in *Lopez* can be broken down into four parts. First, the Court noted the relevance of the nature of the regulated activity; the Court distinguished that case, dealing with the regulation of intrastate possession of guns, from cases dealing with the regulation of an intrastate activity which is economic in nature. Second, the Court considered whether § 922(q) had any jurisdictional element to ensure in individual cases that the firearm possession would affect interstate commerce. Third, the Court considered the importance of legislative history. And finally the Court considered the practical implications of accepting the Government's argument that the economic impact of the regulated activity had sufficient effects on interstate commerce to sustain the regulation.

a. Nature of Regulated Activity

In *Lopez*, the Court noted that *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942), was perhaps the most far-reaching example of Commerce Clause authority over intrastate activity and 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 —— - ——, 115 S. Ct. at 1630-1631. In *Wickard*, Roscoe Filburn operated a small farm in Ohio, on which he raised 23 acres of wheat for the year involved. He would sow winter wheat in the fall, harvest it in July, then sell some of it, feed some of it to his farm animals, and keep the remainder for seeding future crops. *Wickard*, 317 U. S. at 114, 63 S. Ct. at 84.

The Secretary of Agriculture assessed a penalty against Filburn under the Agricultural Adjustment Act of 1938, because Filburn had harvested about 12 more acres of wheat than the Act permitted. *Id.* at 114- 115, 63 S. Ct. at 84. The Court sustained the application of the Act to this activity, stating that home-grown wheat "competes with wheat in commerce," because "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market." *Id.* at 128, 63 S. Ct. at 91.

The *Lopez* Court differentiated § 922(q) from the statute in *Wickard,* because

> [s]ection 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. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Lopez, 514 U. S. at —— - ——, 115 S. Ct. at 1630-1631 (footnote omitted). In effect, the Court separated the Commerce Clause analysis between situations where regulated intrastate activity is economic in nature and situations where the intrastate activity is not. After *Lopez*, cases such as *Wickard*, where regulated intrastate activity is economic in nature, do not control cases where regulated intrastate activity is not economic. At

the least, after *Lopez*, whether intrastate activity is economic in nature is a very relevant consideration.

b. Individual Case Inquiry

In the next step in *Lopez*, the Court considered important that § 922(q) did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at ——, 115 S. Ct. at 1631. Section 922(q) had no jurisdictional element which limited "its reach to a discrete set of firearm possessions" that had "an explicit connection with or effect on interstate commerce." *Id.*

c. Relevance of Legislative History

The Court noted that the Government conceded that no express congressional findings were presented regarding the effects upon interstate commerce of gun possession in a school zone and that "to the extent that congressional findings would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." *Id.* at —— - ——, 115 S. Ct. at 1631-1632. The Court, however, also stated that such findings were not necessary. *Id.* at ——, 115 S. Ct. at 1631 (citations omitted). The Court further noted that Congress had made findings under an amended § 922(q). *Id.* at —— n. 4, 115 S. Ct. at 1632 n. 4. At oral argument, the Government stated regarding the congressional findings, "[W]e're not relying on them in the strict sense of the word, but we think that at a very minimum they indicate that reasons can be

identified for why Congress wanted to regulate this particular activity." *Id.* From this statement, the Court surmised that "[t]he Government [did] not rely upon these subsequent findings as a substitute for the absence of findings in the first instance." *Id.*

d. Practical Implications

The Court addressed the practical implications of accepting as sufficient the Government's argued effects on commerce. *Id.* at —— - ——, 115 S. Ct. at 1632-1634. The Government argued that

> possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

Id. at ——, 115 S. Ct. at 1632.

The Court observed that, if the regulation was constitutional based on these effects, then Congress's power

would be extended too far. Under the Government's "costs of crime" reasoning, Congress could regulate "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* The Court stated that, under the Government's "national productivity" reasoning, Congress could regulate "any activity that [Congress] found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id.* The Court concluded, "Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* Under the "threat to learning" reasoning, Congress could directly regulate family law issues and education. *Id.* at —— - ——, 115 S. Ct. at 1632-1633.

4. Application of *Lopez's* Substantial Effects Analysis to the Case at Hand

Congressional findings in support of VAWA reveal that violence against women is prevalent, and the Senate Report states that

> [g]ender-based violent crimes meet the modest threshold required by the Commerce Clause. Gender-based crimes and fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets–women–from full participation in the national economy. For example, studies report that almost

> 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.

S. Rep. 138, 103d Cong., 1st Sess. 54 (1993). Notably, the *Lopez* Court stated, "'[S]imply because Congress may conclude that a particular activity affects interstate commerce does not necessarily make it so.'" *Lopez*, 514 U. S. at —— n. 2, 115 S. Ct. at 1629 n. 2 (quoting *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U. S. 264, 311, 101 S. Ct. 2389, 2391, 69 L.Ed.2d 1 (1981) (Rhenquist, J., concurring)). "'Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" *Id.* (quoting *Heart of Atlanta Motel v. United States*, 379 U. S. 241, 273, 85 S. Ct. 348, 366, 13 L.Ed.2d 258 (1964)). This is particularly true where, subsequent to the Senate's above finding, the "modest threshold required by the Commerce Clause" has become less modest. The House Conference found:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other

> costs, and decreasing the supply of and the demand for interstate products.

H.R.Rep. No. 711, 103d Cong., 2d Sess. 385 (1994), U. S. Code Cong. & Admin. News 1801, 1853.

The differences between *Lopez* and the case at hand are insignificant, and the similarities are significant. Arguably the following three differences between the case at hand and *Lopez* render *Lopez's* logic inapplicable to the case at hand: (1) that VAWA is civil, and the *Lopez* statute was criminal, (2) that there are legislative findings here but not in *Lopez*, and (3) that fewer steps of causation exist between the VAWA regulated activity and commerce than § 922(q)'s regulated activity and commerce. The similarities include (1) the criminal nature of both statutes, (2) the non-commercial nature of both statutes, (3) the lack of a jurisdictional requirement that some effect on interstate commerce is involved in each case, (4) the remoteness of any effect on commerce, and (5) the excessive congressional power that would logically follow from permitting both statutes based on the Commerce Clause.

a. Possible Differences

A close look at the possible differences reveals that they are insignificant and that the possible differences often point to similarities instead of differences. First, whereas no congressional findings were before the *Lopez* Court connecting the relevant activity to interstate commerce, congressional findings which support that violence against women affects interstate commerce are currently before this Court. As the *Lopez* Court pointed out, however, such findings are not nec-

essary. *Id.* at ——, 115 S. Ct. at 1631 (citations omitted). The Court only found the missing findings relevant in that the findings would have enabled the Court "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye. . . ." *Id.* at ——, 115 S. Ct. at 1632. Having said that, the Court noted that the amended § 922(q) included congressional findings regarding the effects upon interstate and foreign commerce of firearm possession in and around schools. *Id.* at —— n. 4, 115 S. Ct. at 1632 n. 4. If the Court felt that such findings were extremely important, i.e. that the Court did not have a sufficient awareness of the effects absent the findings, then the Court could have considered the added congressional findings even in the face of the Government's statement that it was not relying on the added findings "in the strict sense of the word," but that "at a very minimum [the findings] indicate that reasons can be identified for why Congress wanted to regulate this particular activity." *Id.* The fact that an attorney made an ambiguous statement possibly indicating a minimal reliance on congressional findings does not preclude a court from considering these findings.

Regardless, even absent the express congressional findings, the *Lopez* Court had a sufficient knowledge of interstate commercial effects to consider. The commerce power is based on a reasonable effect on interstate commerce, not on Congress's perceived effect on commerce. While the effects on commerce in *Lopez* were not obvious because they were so tenuous, undoubtedly the Court could fairly easily infer the effects in order to make a reasonable determination whether

these effects were substantially related to commerce. Also, as listed in the appendix to *Lopez*, the Court had much authority to consider regarding the issue. *See id.* at —— - ——, 115 S. Ct. at 1665- 1671. More importantly, the Government actually presented the commercial effects in its argument, and the Court considered whether these sufficed.

In sum, the fact that the effects need not be inferred in the case at hand is not a very important difference. Congress need not make findings, the *Lopez* Court had access to Congress's added findings, the *Lopez* Court had a reasonable appreciation of the effects via reasonable inferences, the authority in the appendix, and the Government's argument, and the *Lopez* Court thoroughly considered the effects presented. The fact that Congress's findings were not stressed in the Government's argument is somewhat incidental, and it appears that the Court mentioned this simply as one feather with which to fill an already full pillow. While findings will often be helpful, findings are not necessary for a determination of whether a rational relation to interstate commerce exists.

Second, the statute at issue is civil, whereas *Lopez* involved a criminal statute. This is technically a correct statement, however, VAWA is criminal in nature. VAWA was designed to address problems in the state criminal justice system, and, in attempting to supplement deficiencies in the state criminal system, it creates a civil cause of action that seeks to vindicate a criminal act. It provides a civil remedy for a "crime of violence," which is defined in part 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." 42 U.S.C. § 13981(d)(2)(A). A person liable under the act "shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." 42 U.S.C. § 13981(c). Regardless, whether a statute based on the Commerce Clause is civil or criminal is of limited relevance. With statutes regulating intrastate activities, the primary concern is whether the activity is economic. Other than the economic nature of the activity to be regulated, the focus is not on the nature of the activity but on the related issue of the effects of the regulated activity on interstate commerce.

Third, the steps of causation in the instant case are fewer than in *Lopez*. At best, an analysis of the steps of causation is an inexact science; the number of steps depends on how each step is defined, and a greater number of steps does not always indicate greater remoteness. Certainly this should not be the method for resolving Commerce Clause issues. In *Lopez*, the Government argued and the Court considered two general chains of causation. First, the possession of a firearm in a school zone may result in violent crime which may affect the national economy through either increased nationwide costs or a reduction in the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Second, guns pose a substantial threat to the educational process by threatening the learning environment, and a handicapped educational environment leads to a less productive citizenry which affects the national economy.

While the problems inherent in a step of causation analysis are compounded when comparing two different laws, comparing the steps in the case at hand to *Lopez* is helpful. Compared with *Lopez's* first chain of causation, the case at hand possibly involves one less step than the postulated effects in *Lopez*. In the case at hand, the regulated activity is the violent crime, whereas in *Lopez* the regulated activity was an act that could lead to a violent crime. This distinction is not enough to apply the commerce power in the case at hand. The step from possession of a firearm in schools to the commission of a violent crime is a small step. Undoubtedly, often possession of a firearm leads to violent crime. Also, no violent crime is necessary to create an effect on commerce; the fear created solely by the possession of the guns undoubtedly somewhat affects commerce. Finally, the individual steps that each case has in common may be longer in the case at hand than in *Lopez*.

Lopez's second chain of causation is similar to plaintiff's argument that violent crimes against women affect the productivity of the nation by distracting women and by removing women from the workplace. Similarly, guns at schools affect the productivity of the nation by threatening the learning environment. It is a fair inference that guns at schools are distracting and dissuade many students from attending schools. This chain also involves one less step. Guns affect learning, an effect which in turn affects job performance, which in turn affects the national economy, which in turn affects interstate commerce. In the case at hand, violence against women affects job performance, which in turn affects the national economy, which in turn affects interstate commerce. Again the one less step in the case at hand is unimportant. It is far from clear that

the distance from the first to the last step is greater in the *Lopez* chain of causation than in the case at hand's chain.

The bottom line is that both *Lopez* and the case at hand involve regulated activity that is too remote from interstate commerce. Any substantial distinction between the lengths of the chains of causation in *Lopez* and the lengths of the chains in the case at hand is inconsequential. As mentioned, the steps of causation analysis is an inexact science, a formalistic framework upon which no heavy reliance should be placed. In the end, the important issue is the proximity of the regulated activity to commerce, not the number of steps. The proximity between the regulated activity and commerce in the case at hand is similar to the proximity in *Lopez*, and any distinction between the two is based on insignificant differences and on differences which are impossible to comprehend with reasonable certainty. Even accepting the step analysis as helpful and accepting that the case at hand involves fewer steps than the situation in *Lopez*, both situations involve regulated activity which is too remote from interstate commerce.

b. Similarities (Other Than Those in the Possible Differences Section)

Unlike the differences, the similarities between *Lopez* and the case at hand are real and significant. First, of major importance is that VAWA involves intrastate activity which is not commercial or even economic in nature. Any interstate nature of VAWA is insignificant. VAWA regulates local criminal activity. It does not regulate the growth of crops, the shipment of goods, or other similar economic activities. In line

with *Lopez*, whether a statute regulates intrastate activity which is economic in nature is a consideration. *See Lopez*, 514 U. S. at —— - ——, 115 S. Ct. at 1630-1631. In *Jane Doe v. John Doe*, 929 F. Supp. 608 (D.Conn.1996), the only other opinion I am aware of that addresses this issue to date, the court upheld the constitutionality of VAWA under the Commerce Clause. The court compared the situation in *Wickard* to VAWA. As mentioned, the *Wickard* Court upheld the application of the Agricultural Adjustment Act to home-consumed wheat, stating, "It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Wickard*, 317 U. S. at 128, 63 S. Ct. at 91. Analyzing VAWA in light of *Wickard*, the *Doe* court concluded:

> Certainly the repetitive nationwide impact of women withholding, withdrawing or limiting their participation in the workplace or marketplace in response to or as a result of gender-based violence or the threat thereof, is of such a nature to be as substantial an impact on interstate commerce as the effect of excess "home grown" wheat harvesting which was found to have been properly regulated by Congressional enactment.

Doe, 929 F. Supp. at 614 (citation omitted). This analysis is contrary to *Lopez*, which, as discussed, distinguished the *Wickard* case, in which the regulated activity was economic in nature, from cases such as the case at hand and *Lopez*, in which the regulated activity is in no way economic in nature. *Lopez* teaches that cases in which the statute at issue regulates intrastate activity which is economic in nature are analyzed differently from cases involving non-economic intrastate activity.

After *Lopez*, reliance on *Wickard* to analyze the commerce power in a case involving a non-economic intrastate activity is not tenable.[2] In addition to *Wickard*, the other cases upon which plaintiff relies heavily are all distinguishable as cases involving economic activity. *See Lopez*, 514 U. S. at ——, 115 S. Ct. at 1630 (listing the following as cases involving congressional acts regulating intrastate economic activity: *Hodel*, 452 U. S. 264, 101 S. Ct. 2352, 69 L.Ed.2d 1 (1981) (involving intrastate coal mining); *Perez v. United States*, 402 U. S. 146, 91 S. Ct. 1357, 28 L.Ed.2d 686 (1971) (involving intrastate extortionate credit transactions); *Katzenbach v. McClung*, 379 U. S. 294, 85 S. Ct. 377, 13 L.Ed.2d 290 (1964) (involving restaurants utilizing substantial interstate supplies); and *Heart of Atlanta Motel*, 379 U. S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964) (involving inns and hotels catering to interstate guests)).

Second, similar to § 922(q), VAWA does not have a jurisdictional requirement limiting each individual case under VAWA to situations involving interstate commerce. Although it is unclear whether such a jurisdictional requirement is needed, indications exist that

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[2] The *Doe* court also based its holding partly on the conclusion that *Lopez's* practical implications analysis was *dicta*. *See Doe*, 929 F. Supp. at 613. Counsel for defendants disagree, as do I. However, if this analysis was in fact *dicta*, this would not help the position of the *Doe* court. If the practical implications analysis was unimportant, this would only bolster the importance of the nature of the regulated activity analysis and of the individual case jurisdictional requirement analysis and would increase the likelihood that, if intrastate activity is non-economic in nature and if no requirement exists mandating a connection to commerce in each case, then Congress cannot regulate the activity under the commerce power.

such a requirement may be necessary. Congress has often placed such a requirement in legislation similar to VAWA. *See Cleveland v. United States*, 329 U. S. 14, 67 S. Ct. 13, 91 L.Ed. 12 (1946) (discussing the Mann Act, which made an offense the transportation in interstate commerce of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose). In *United States v. Bass*, 404 U. S. 336, 92 S. Ct. 515, 30 L.Ed.2d 488 (1971), respondent had been convicted for possession of firearms under Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which mandated punishment for any convict "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm." *Id.* at 337, 92 S. Ct. at 517. There was no attempt to show that respondent had possessed the firearms "in commerce or affecting commerce," and the prosecution had proceeded on the assumption that such connection to commerce was necessary only for the transport element of the statute, not for possession. *Id.* at 338, 92 S. Ct. at 517-518. The Court of Appeals reversed respondent's conviction, finding that if it accepted the prosecution's interpretation of the statute, then there would be substantial doubt as to the statute's constitutionality. *Id.* (citation omitted). The Supreme Court affirmed, but for different reasons, applying the interstate commerce requirement to receiving, possessing, or transporting a firearm. The Court reasoned that ambiguity in criminal statutes should be resolved in favor of lenity, *Id.* at 347, 92 S. Ct. at 522, and that ambiguity should be resolved in favor of not significantly changing the federal-state balance. *Id.* at 349, 92 S. Ct. at 523.

Third, similar to the situation in *Lopez*, permitting VAWA as a constitutional exercise of the commerce power would have the practical result of excessively extending Congress's power and of inappropriately tipping the balance away from the states. The *Lopez* Court placed much importance on the practical implications of permitting § 922(q) under the Commerce Clause. The practical implications in the case at hand are very similar.

A reasonable inference from the congressional findings is that violence against women has its major effect on the national economy. Congress focused on the effect on the national economy, and a reasonable inference, based both on Congress's focus and common sense, is that the effects on interstate travel are incidental. Showing that something affects the national economy does not suffice to show that it has a substantial effect on interstate commerce. Plaintiff uses "effects on the national economy" interchangeably with "effects on interstate commerce." This is wrong. Undoubtedly effects on the national economy in turn affect interstate commerce. Such a chain of causation alone, however, is insufficient to bring an act within the purview of the commerce power. If such a chain of causation sufficed, Congress's power would extend to an unbounded extreme. Defendants point out that facts show that insomnia costs the United States $15 billion a year (citing 2 Nat'l Comm'n On Sleep Disorders Research, *Wake Up America: A National Sleep Alert* (submitted to the U. S. Congress and the Secretary of Health and Human Services), 125-133 (1994)). This is as much as the yearly cost of domestic abuse. Other sources indicate that the cost of insomnia is much higher. *See* 140 Cong. Rec. S. 14211-01, *The Economics*

of Insomnia (daily ed. Oct. 5, 1994) (statement of Sen. Hatfield) (stating that a source indicates that the estimated annual economic cost of insomnia due to reduced productivity, accidents, and medical problems is between $92.5 and $107.5 billion). Insomnia undoubtedly also has some effect on interstate travel as insomniacs travel across state lines for treatment (e.g., to the nationally-renowned Johns Hopkins Sleep Disorder Center in Maryland). Insomniacs buy medicine which has traveled across state lines. Family law issues and most criminal issues affect the national economy substantially and in turn have some effect on interstate commerce. These too have interstate travel implications. However, to extend Congress's power to these issues would unreasonably tip the balance away from the states.

The fact that Congress limited VAWA, in stating that VAWA does not "confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree," 42 U.S.C. § 13981(e)(4), is utterly insignificant to the practical implications of accepting the regulated activity as having a substantial effect on interstate commerce. It is the logic on which Congress based its commerce power that is important. If the justification for VAWA under the Commerce Clause is constitutionally acceptable, then certainly Congress would have power to regulate much activity which should be left to state control. Similar to the situation in *Lopez*, if I accepted plaintiff's argument, I would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, —- U. S. at ——, 115 S. Ct. at 1632. In essence, if VAWA is a per-

missible use of the commerce power because of the regulated activity's effect on the national economy, which in turn affects interstate commerce, then it would be inconsistent to deny the commerce power's extension into family law, most criminal laws, and even insomnia.

The combination of the insignificance of the differences between the case at hand and *Lopez* and the significance of the similarities leads to the conclusion that Congress acted beyond its commerce power in enacting VAWA. Any other conclusion would strain reason. As Justice Scalia recently stated regarding the Supreme Court, "[W]e expect both ourselves and lower courts to adhere to the 'rationale upon which the Court based the results of its earlier decisions.'" *United States v. Virginia*, —- U. S. ——, ——, 116 S. Ct. 2264, 2305, 135 L.Ed.2d 735 (Scalia, J., dissenting) (quoting *Seminole Tribe of Fla. v. Florida*, —- U. S. ——, —— -——, 116 S. Ct. 1114, 1128-1129, 134 L.Ed.2d 252 (1996)). A reasonable adherence to *Lopez* reveals that VAWA is not a proper use of the commerce power.

B. The Enforcement Clause

The Fourteenth Amendment states in part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1. It also states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U. S. Const., amend. XIV, § 5.

1. Some Public Involvement Needed

The Supreme Court has explicitly stated that the Fourteenth Amendment regulates only state action and that some state involvement is necessary. *See*, *e.g.*, *Civil Rights Cases*, 109 U. S. 3, 11, 3 S. Ct. 18, 21, 27 L.Ed. 835 (1883) (stating that an "[i]ndividual invasion of individual rights is not the subject matter of the [Fourteenth A]mendment"); *Shelley v. Kraemer*, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948) (stating that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful"); *United States v. Guest*, 383 U. S. 745, 755, 86 S. Ct. 1170, 1176, 16 L.Ed.2d 239 (1966) (opinion of Stevens, J.) ("It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority"); *Bray v. Alexandria Women's Health Clinic*, 506 U. S. 263, 352-355, 113 S. Ct. 753, 802-804, 122 L.Ed.2d 34 (1993) (O'Connor, J., dissenting).

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct which they cannot fairly be blamed.

Lugar v. Edmondson Oil Co., 457 U. S. 922, 936, 102 S. Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). The Fourteenth Amendment states, "*No state* . . . shall deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1 (emphasis added).

The legislative history behind the Fourteenth Amendment indicates that the congressional framers were concerned with private encroachment on civil rights. *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1329-1330 (1952). However, by holding that the Fourteenth Amendment applies to private conduct with a certain connection to state action, the Fourteenth Amendment can still reach some private conduct. But Supreme Court precedent and, moreover, the language of the Fourteenth Amendment require that some state involvement is necessary, even though it may be tangential.

Some authority indicates that Congress may address purely private conduct *via* § 5 of the Fourteenth Amendment in spite of the fact that § 1 actions require state action. In *Guest*, while Justice Stevens' opinion of the Court mandated some public involvement for Congress's use of the power granted by § 5 of the Fourteenth Amendment, six justices agreed that no state action was necessary for Congress's use of § 5. 383 U. S. at 762, 774-786, 86 S. Ct. at 1180, 1186-1193; *see also*, *District of Columbia v. Carter*, 409 U. S. 418, 93 S. Ct. 602, 34 L.Ed.2d 613 (1973) (opinion of Brennan, J.) (stating first, "The Fourteenth Amendment itself 'erects no shield against merely private conduct, however discriminatory or wrongful,'" *id.* at 423-424, 93 S. Ct. at 606 (quoting *Shelley v. Kraemer*, 334 U. S. at 13, 68 S. Ct. at 842), then stating in a footnote, "This is not to say, *of course*, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment." *Id.* at 424 n. 8, 93 S. Ct. at 606 n. 8 (emphasis added)). Although Congress has certain discretion under § 5, the idea that Congress can address

purely private conduct under § 5 is contrary to both the language of the Fourteenth Amendment and the *Civil Rights Cases*, 109 U. S. 3, 11, 3 S. Ct. 18, 21, 27 L.Ed. 835 (1883) (stating that § 5 permits Congress only to "adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectively null, void, and innocuous"). The Court has stressed that, even in the face of conflicting Supreme Court decisions, lower courts are not to assume that Supreme Court precedent has been implicitly overruled, *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-1922, 104 L.Ed.2d 526 (1989), and the Court has cited the *Civil Rights Cases* approvingly as recently as 1982. *See Lugar*, 457 U.S. at 936, 102 S. Ct. at 2753.

2. *Morgan*

Even though state action was not at issue in *Katzenbach v. Morgan*, 384 U. S. 641, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966), the plaintiff relies primarily on the sweeping language of *Morgan* in support of her position that the Fourteenth Amendment reaches private conduct. In *Morgan*, the Court considered whether § 4(e) of the Voting Rights Act of 1965 was constitutional under § 5 of the Fourteenth Amendment. Section 4(e) provided in relevant part that no person who successfully completed the sixth grade in public or private school in Puerto Rico in which the language of instruction was other than English shall be denied the right to vote because of an inability to read or write English. *Id.* at 643, 86 S. Ct. at 1719. Appellees in the case challenged § 4(e) in that it prohibited the enforcement of the election laws of New York, which required

an ability to read and write English as a condition of voting. *Id.* at 643-644, 86 S. Ct. at 1719-1720. Appellees attacked § 4(e) because it enabled many New York residents to vote who could not previously vote under the New York law. *Id.* at 644-645, 86 S. Ct. at 1720. The Court held that § 4(e) was a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment, and, by force of the Supremacy Clause, the New York English literacy requirement could not be enforced to the extent that it was inconsistent with § 4(e). *Id.* at 646-647, 86 S. Ct. at 1721. The Court stated, "A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." *Id.* at 648, 86 S. Ct. at 1722. The Court's task was not to determine "whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rico school violate[d] the Equal Protection Clause." *Id.* at 649, 86 S. Ct. at 1722-1723. Instead, the Court's task was to determine whether § 4(e) was "as required by § 5, appropriate legislation to enforce the Equal Protection Clause." *Id.* at 649-650, 86 S. Ct. at 1723.

The Court noted that § 5 has a broad scope. *Id.* at 650, 86 S. Ct. at 1723. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* (quoting *M'Culloch v. Maryland*, 17 U. S. (4 Wheat.)

316, 421, 4 L.Ed. 579 (1819)). Therefore, the test is (1) whether a statute "may be regarded as an enactment to enforce the Equal Protection Clause, [(2)] whether it is 'plainly adapted to that end' and [(3)] whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Id.* at 651, 86 S. Ct. at 1724 (quoting *M'Culloch*, 17 U. S., (4 Wheat.) at 421).

Regarding the first requirement, the Court stated, "There can be no doubt that § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause." *Id.* at 652, 86 S. Ct. at 1724. Congress "explicitly declared" that it enacted § 4(e) to secure rights under the Fourteenth Amendment, and "§ 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government." *Id.* Regarding the second requirement, the Court indicated that § 4(e) "may be readily seen as 'plainly adapted'" to furthering aims of the Equal Protection Clause. *Id.* Section 4(e) in effect "prohibit[s] New York from denying the right to vote to large segments of its Puerto Rican community" and thus enhances the Puerto Rican community's political power, which in turn "will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." *Id.* at 652, 86 S. Ct. at 1724. "Section 4(e) thereby enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.'" *Id.* at 652-653, 86 S. Ct. at 1724-1725. Therefore, *Morgan* involved state action (New York's statute) which caused an infringement on Fourteenth Amendment rights.

The extent of *Morgan*'s applicability to the case at hand is limited. In *Morgan*, Congress's statute in-

validated a state statute and thereby remedied equal protection violations. 384 U. S. at 652-653, 86 S. Ct. at 1724-1725. Reasonably *Morgan* is limited to situations where Congress acted against state action which caused a denial of equal protection, and *Morgan* does not permit Congress to act against purely private action incidentally giving rise to state action which causes a denial of equal protection. However, *Morgan* is distinguishable on other grounds as well, as will be discussed.

3. VAWA

VAWA has two general purposes. It was enacted to attack gender-motivated crime against women and to supplement deficiencies in the state criminal justice system. First, VAWA adds to state systems a remedy for the bias element of gender-motivated violent crimes against women. VAWA "attacks gender-motivated crimes that threaten women's equal rights," taking "aim at gender discrimination prohibited under the [Thirteenth] Amendment." S. Rep. No. 197, 102d Cong., 1st Sess. 53 (1991).[3] "State and Federal criminal laws do not adequately protect against the bias element of crimes of violence motivated by gender." H.R. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994), U. S. Code Cong. & Admin. News 1801, 1853. The Senate found,

> [w]here a crime is shown to be motivated by gender bias, a different interest is implicated; one not adequately addressed by State tort law alone. The civil

[3] The fact that Congress based this in part on gender discrimination "prohibited under the [Thirteenth] Amendment" illustrates the straw grasping in which Congress engaged. The Thirteenth Amendment applies to racial, not gender, discrimination.

> rights action provided by [T]itle III has the entirely different function of providing a special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victims' civil rights. Title III singles out for enhancement bias-inspired conduct because of the unique individual and societal harm it causes. For example, the supreme [sic] Court has recognized that bias crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. Quoting Blackstone, "'it is but reasonable that among crimes of different natures those should be most severely punished which are the most destructive of the public safety and happiness.'"

S. Rep. No. 138, 103d Cong., 1st Sess. 50 (1993) (footnotes omitted).

Second, purportedly VAWA "provides a 'necessary' remedy to fill the gaps and rectify the biases of existing State laws." S. Rep. No. 197 at 53. "In many States, rape survivors must overcome barriers of proof and local prejudice that other crime victims need not hurdle; they bear the burden of painful and prejudicial attacks on their credibility that other crime victims do not shoulder; they may be forced to expose their private life and intimate conduct to win a damage award unlike any other civil litigant; and, finally, in some cases, they are barred from suit altogether by tort immunity doctrines and marital exclusions." *Id.* at 53-54. State and federal criminal laws do not "adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often de-

prives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994), U. S. Code Cong. & Admin. News 1801, 1853. "Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men." *Id.* (footnote omitted). The state criminal systems are inadequate at the police, the prosecution, and the judicial levels. *See Violence Against Women, Hearing Before the House Subcommittee on Crime and Criminal Justice*, 102d Cong., 2d Sess. 70-82 (1992) (statement and prepared statement of Margaret Rosenbaum, Assistant State Attorney, Miami, Fla.); H.R. Rep. 395, 103d Cong., 1st Sess. 27-28 (1993).

Congress has wide latitude under the Fourteenth Amendment. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Morgan*, 384 U.S. at 651, 86 S. Ct. at 1723-1724. Despite this broad power, Congress's acts must have some reasonable possibility of addressing a legitimate equal protection concern. Otherwise, Congress's power under the Fourteenth Amendment would be absolute. In *Morgan*, the Court found that Congress's statute "enable[d] the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.'" 384 U. S. at 653, 86 S. Ct. at 1724. Implicit in this finding is that, at the least, in order for Congress to act under § 5, there must be some reasonable possibility that Congress's act is a legitimate means for remedying a legitimate end (i.e., a legitimate remedy for a legitimate equal protection con-

cern). With respect to VAWA, I will discuss (1) whether Congress's ends are legitimate and, if so, (2) whether Congress's means are legitimate.

a. Whether Congress's Ends Are Legitimate

As stated, Congress had two ends in mind in drafting VAWA: (1) to remedy private individuals' gender-based violence and (2) to remedy gender-based deficiencies in the states' criminal justice systems.

i. To Remedy Private Individuals' Violence

First, regarding the purpose to create a cause of action against the criminal discriminator, sufficient contacts to state action do not exist to give rise to a legitimate equal protection concern. If state action were sufficiently connected to a criminal's discriminating acts, a legitimate equal protection concern would exist. However, no such sufficient connection exists.

"[T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *Guest*, 383 U. S. at 755-756, 86 S. Ct. at 1177 (citations omitted). Conduct allegedly causing the deprivation of a federal right must be fairly attributable to the state. *Lugar*, 457 U. S. at 937, 102 S. Ct. at 2753. Conduct causing the deprivation of a federal right may be fairly attributable if (1) "the deprivation [is] caused by the exercise of some right or privilege created by the State or by a rule of conduct

imposed by the State or by a person for whom the state is responsible" or if (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor" (because, for example, "he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State"). *Id.* (citations omitted).

A private individual's gender-based violent crime against a woman does not qualify for either category. The deprivation caused by private individuals who commit crimes against women due to gender is not caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. Certainly the state is not responsible in any relevant sense for individuals who commit violent crimes against women. Even with the inadequate criminal remedy for gender-motivated crimes against women, the states do not permit individuals to commit violent gender-motivated acts against women. The state action at issue (the inadequacies in the state criminal systems) does not cause, or, in any significant manner, even contribute to, the deprivation caused by the individual criminal. The private individual's decision to discriminate by committing a gender-based violent act against a woman cannot be ascribed to any governmental decision. *Cf. id.* at 938, 102 S. Ct. at 2754 (citing *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 92 S. Ct. 1965, 32 L.Ed.2d 627 (1972)). Such acts are unlawful both under state criminal and state tort laws, and, even if the states pursue their criminal laws against rape and domestic abuse less vigorously than other laws, the Court has held that if an act is unlawful, then it cannot be ascribed

to any governmental decision. *See id.* at 940, 102 S. Ct. at 2755 (to say that conduct is unlawful under state law "is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State").

The private individual criminal is also not a person who may fairly be said to be a state actor. The targets of VAWA are not state officials, but instead are the individual criminals; these targets have not acted together with or obtained significant aid from state officials; and the criminal conduct is not otherwise chargeable to the state. No possibility exists that VAWA defendants obtained significant aid from the state criminal justice systems' deficiencies in the commission of the discriminatory violent crimes. A rapist who rapes in part due to a woman's gender commits one act of discrimination, and deficiencies in the state criminal system effect a separate act of discrimination. Two separate acts of discrimination occur. The rapist does not rely on the state in any real sense as an accomplice to his act of discrimination. The state action related to VAWA is distinct from the discriminatory act of the private individual.

In *Guest*, the prosecutor had alleged in part in an indictment that six private individual defendants had conspired to

> injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of: "The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia,

> owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof."

383 U. S. at 753, 86 S. Ct. at 1175. The Court considered whether the cause of action, based on the Fourteenth Amendment, had to be dismissed because the indictment named no one alleged to have acted under the color of state law, and because "[t]he Equal Protection Clause speaks to the State or to those acting under the color of its authority." *Id.* at 754, 86 S. Ct. at 1176.

> [T]he indictment in fact contain[ed] an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss. One of the means of accomplishing the object of the conspiracy, according to the indictment, was "By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."

Id. at 756, 86 S. Ct. at 1177 (footnote omitted). Three members of an earlier Court had expressed the view that a private businessman's invocation of state police and judicial action to carry out his own policy of racial discrimination was sufficient to create equal protection rights in those against whom the racial discrimination was directed. *Id.* (citing *Bell v. Maryland*, 378 U. S. 226, 242-286, 84 S. Ct. 1814, 1823-1847, 12 L.Ed.2d 822 (1964) (in *Bell*, Maryland police had arrested black students, and a Maryland court had convicted the students for participating in a sit-in. The students had appealed their conviction to the Supreme Court)). From the facts alleged in the indictment in *Guest*, it was possible that state officials engaged in no more than cooperative private and state action similar to that in *Bell*, but it was also possible that agents of the state

actively participated in discrimination. *Id.* at 756-757, 86 S. Ct. at 1176-1177.

Unlike the statute involved in *Guest*, as exemplified by the possible extent of complicity between the state and private actors in the facts of *Guest*, there is no real possible complicity between the state criminal justice system and private actors in VAWA actions. In fact, the congressional findings do not mention such complicity. Theoretically there could be some complicity in that both the state and the criminal may discriminate against the female victim. The two acts of discrimination, however, are separate, and no indication exists that the state inaction or inadequate action against the criminal helps or encourages the criminal to commit his gender-based act of violence.

In *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1947), the Court considered the validity of state courts' enforcement of private restrictive covenants having as their purpose the exclusion of blacks from the ownership or occupancy of real property. *Id.* at 4, 68 S. Ct. at 838. Blacks had occupied property subject to the restrictive covenants, and the state courts enforced the restrictive covenants, requiring the blacks to leave the property. *Id.* at 5-6, 68 S. Ct. at 838-839. The Supreme Court held that the state courts' enforcement of the restrictive covenants was sufficient state action.

It is clear that but for the active intervention of the state courts, supported by the full

> panoply of state power, petitioners would have been free to occupy the properties in question without

> restraint. These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.

Id. at 19, 68 S. Ct. at 845.

The situation at hand differs from *Shelley* in two respects. First, the state criminal systems' insufficient treatment of perpetrators of violence against women is "merely abstaining from action" and lacks the active intervention attributed to the state courts' actions in *Shelley*. It is the state systems' inaction or inadequate action towards the violent criminals which concerned Congress. Second, unlike in *Shelley*, with VAWA no possibility exists that but for the state's inadequate action, the criminals would not commit the discriminatory crimes.

In *Flagg Bros., Inc. v. Brooks*, 436 U. S. 149, 98 S. Ct. 1729, 56 L.Ed.2d 185 (1978), the plaintiff had been evicted from her apartment, and the city marshal had arranged for the plaintiff's possessions to be stored by Flagg Brothers in its warehouse. *Id.* at 153, 98 S. Ct. at 1732. Plaintiff disputed her moving and storage costs, and Flagg Brothers undertook to enforce its warehousemen's lien which was created by New York Uniform Commercial Code § 7-210. *Id.* at 151 n. 1, 153, 98

S. Ct. at 1731 n. 1, 1732. The Second Circuit found that because the state statute had created the lien which permitted a private individual to, in effect, violate the due process clause, there was sufficient state involvement to satisfy the state action requirement. *Id.* at 154-155, 98 S. Ct. at 1732-1733. The Supreme Court disagreed, stating,

> While as a factual matter any person with sufficient physical power may deprive a person of his property, only a state or private person whose actions "may be fairly treated as that of the state itself" . . . may deprive him of "an interest encompassed within the Fourteenth Amendment's protection."

Id. at 157, 98 S. Ct. at 1734 (citations omitted).

> 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."

Id. at 164-165, 98 S. Ct. at 1737-1738 (citations omitted). The Court found that there was a "total absence of overt official involvement," *id.* at 157, 98 S. Ct. at 1734 (citations omitted), in spite of the fact that state officials had passed § 7-210. "It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforc-

ing that body of law." *Id.* at 160 n. 10, 98 S. Ct. at 1735 n. 10.

VAWA is unlike *Flagg Brothers* in that VAWA involves active current decisions by state actors and in that VAWA involves the method of enforcement of laws as well as the bodies of laws themselves. However, more relevantly, similar to *Flagg Brothers*, VAWA involves state inaction or inadequate action towards the individual causing the deprivation, and VAWA involves no overt official involvement. Following the logic of *Flagg Brothers*, this is not authorization or encouragement of the deprivation.

In *Lugar*, the Court considered in part whether private individuals' use of state officials to take advantage of state-created attachment procedures constituted sufficient state action. *Lugar*, 457 U. S. at 942, 102 S. Ct. at 2756. The Court held that such joint participation between private individuals and the state sufficed to make the conduct fairly attributable to the state. *Id.* Due to the private party's joint participation with the state officials, the private party was a "state actor." *Id.* at 941-942, 102 S. Ct. at 2756. This is different from VAWA which involves situations where private individuals do not act together with or receive any significant aid from the state in the commission of the violent act.

Therefore, remedying private individuals' gender-based crimes is not a legitimate equal protection goal due to the fact that no sufficient state contacts exist.

ii. To Remedy Deficiencies in State System

Some possibility exists that at least part of the states' differential treatment of gender-based violent crimes against women is due to gender discrimination, and so correcting the differential treatment arising out of gender discrimination is a legitimate Fourteenth Amendment concern. Considering Congress's broad discretion, a legitimate equal protection concern exists within state criminal justice systems.

b. Whether Congress's Means Are Legitimate

As stated, Congress's purpose to remedy discrimination by private individuals who commit gender-based violent crime against a woman is an illegitimate Fourteenth Amendment end, and so addressing whether the means sufficiently address this end is unnecessary. In contrast, the purpose to remedy deficiencies in the state system is a legitimate end, but no reasonable possibility exists that VAWA will help remedy this legitimate Fourteenth Amendment concern.

The § 5 analysis scheme presented in *Morgan* focused on whether an act of Congress remedies a legitimate Fourteenth Amendment concern. In *Morgan* the Court found that Congress's act would remedy a legitimate equal protection concern. *Morgan*, 384 U. S. at 652-653, 86 S. Ct. at 1724-25. At least a reasonable possibility must exist that Congress's act remedies a legitimate Fourteenth Amendment concern. While remedying the state criminal system's deficiencies is a legitimate Fourteenth Amendment concern, VAWA does not address this concern, because VAWA provides no remedy for the deficiencies. It does not provide a remedy to the

victim for the denial of the victim's equal protection rights by either undoing or stopping the specific equal protection violation or by compensating the victim for the violation, nor does it provide a remedy against the Fourteenth Amendment violator.

Clearly VAWA does not undo or stop the violations in the states' criminal justice systems. Also, it does not adequately compensate victims for the denial of their equal protection rights. VAWA is tailored to remedy conduct other than the conduct giving rise to the equal protection concern. VAWA compensates victims for the violence directed against them because of their gender, not for the states' denial of equal protection. If in a certain case VAWA comes close to accurately remedying deficiencies in the states' systems, it is purely by chance. To illustrate the problem, clear examples exist whereby VAWA will not compensate victims for the states' denial of women's equal protection rights. 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.

The aim of legislation to cure Fourteenth Amendment violations should be at the entity which causes the violation. In this case that entity is the states. VAWA does not address the states, which are the perpetrators of the Fourteenth Amendment violation; it is wholly silent about the conduct of the various states in their handling of rape and other violent crimes against women. Consequently, VAWA does nothing to discourage the Fourteenth Amendment violations which occur in the state criminal systems. Instead of addressing the Fourteenth Amendment violation by the states' criminal justice system, VAWA authorizes a cause of action against an individual who did not contribute in any real sense to the unequal treatment in the states' criminal justice systems. In *Guest*, the individuals subject to the cause of action had allegedly involved the state to deprive blacks of equal protection rights. The individuals and the state were possibly conspirators to deprive equal protection. The cause of action at issue in *Guest* was a remedy against possible Fourteenth Amendment violation perpetrators. Unlike *Guest*, the private acts which VAWA targets are incidental to the Fourteenth Amendment violation. Therefore, VAWA provides no remedy against the Fourteenth Amendment violation perpetrator.

No reasonable possibility exists that, in enacting VAWA, Congress has enforced the Fourteenth Amendment mandate that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1. No reasonable possibility exists that VAWA will remedy any legitimate Fourteenth Amendment concern.

VI. Conclusion

Without a doubt violence against women is a pervasive and troublesome aspect of American life which needs thoughtful attention. But Congress is not invested with the authority to cure all of the ills of mankind. Its authority to act is limited by the Constitution, and the constitutional limits must be respected if our federal system is to survive. Congress's reliance on the Commerce Clause and the Fourteenth Amendment to support its authority to enact VAWA is misplaced. This is not to say that Congress is powerless to address the problem of violence against women. A properly drafted statute within the parameters of the Fourteenth Amendment, as interpreted by the Supreme Court could certainly be crafted.

Although plaintiff states a claim under VAWA for purpose of Fed. R. Civ. P. 12(b)(6), VAWA is an unconstitutional exercise of Congress's power, unjustified under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment. Consequently, defendants' motion to dismiss the VAWA claims with prejudice is granted. I decline to exercise supplemental jurisdiction over the state claims and dismiss these without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

The clerk will enter an appropriate order.

For the reasons stated in the accompanying memorandum opinion, the Violence Against Women Act, 42 U.S.C. § 13981, claims against Antonio Morrison and James Crawford are dismissed with prejudice. The state claims are dismissed without prejudice. The case is dismissed. The Clerk is directed to remove the case

from the docket and to certify copies of this order and the accompanying memorandum opinion to all counsel of record.

APPENDIX D

Statutory provisions

42 U.S.C. 13981 provides:

Civil rights

(a) Purpose

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

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section—[4]

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means—

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that

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[4] So in original. The word "means" probably should appear after "(A)" below.

cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) No prior criminal action

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.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

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