

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 99–5 and 99–29

99–5 UNITED STATES, PETITIONER
v.
ANTONIO J. MORRISON ET AL.

99–29 CHRISTY BRZONKALA, PETITIONER
v.
ANTONIO J. MORRISON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[May 15, 2000]

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

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

I

The majority holds that the federal commerce power
does not extend to such “noneconomic” activities as
“noneconomic, violent criminal conduct” that significantly
affects interstate commerce only if we “aggregate” the
interstate “effect[s]” of individual instances. *Ante*, at 17–
18. JUSTICE SOUTER explains why history, precedent, and

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legal logic militate against the majority's approach. I agree and join his opinion. I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone— a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

A

Consider the problems. The “economic/non-economic” distinction is not easy to apply. Does the local street corner mugger engage in “economic” activity or “non-economic” activity when he mugs for money? See *Perez v. United States*, 402 U. S. 146 (1971) (aggregating local “loan sharking” instances); *United States v. Lopez*, 514 U. S. 549, 559 (1995) (loan sharking is economic because it consists of “intrastate extortionate credit transactions”); *ante*, at 9. Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute? See United States General Accounting Office, Health, Education, and Human Services Division, Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients 7–8 (Nov. 1998); Brief for Equal Rights Advocates, *et al.* as *Amicus Curiae* 10–12.

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

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at 9–10 (same). And it would permit Congress to regulate where that regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Lopez, supra*, at 561; cf. Controlled Substances Act, 21 U. S. C. §801 *et seq.* (regulating drugs produced for home consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law by including it, or much of it, in a broader “Safe Transport” or “Workplace Safety” act?

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

This Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38–39 (1937) (focusing upon interstate effects); *Wickard v. Filburn*, 317 U. S. 111, 125 (1942) (aggregating interstate effects of wheat grown for home consumption); *Heart of Atlanta Motel, supra*, at 258 (“[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze” (quoting *United States v. Women’s Sportswear Mfrs. Assn.*, 336 U. S. 460, 464 (1949))). Nothing in the Constitution’s

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language, or that of earlier cases prior to *Lopez*, explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how “local” it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how “economic” it is).

Most important, the Court’s complex rules seem unlikely to help secure the very object that they seek, namely, the protection of “areas of traditional state regulation” from federal intrusion. *Ante*, at 15. The Court’s rules, even if broadly interpreted, are underinclusive. The local pickpocket is no less a traditional subject of state regulation than is the local gender-motivated assault. Regardless, the Court reaffirms, as it should, Congress’ well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite—for example, that some item relevant to the federally regulated activity has at some time crossed a state line. *Ante*, at 8–9, 11, 13, and n. 5; *Lopez, supra*, at 558; *Heart of Atlanta Motel, supra*, at 256 (“[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question” (quoting *Caminetti v. United States*, 242 U. S. 470, 491 (1917))); see also *United States v. Bass*, 404 U. S. 336, 347–350 (1971) (saving ambiguous felon-in-possession statute by requiring gun to have crossed state line); *Scarborough v. United States*, 431 U. S. 563, 575 (1977) (interpreting same statute to require only that gun passed “in interstate commerce” “at some time,” without questioning constitutionality); cf., e.g., 18 U. S. C. §2261(a)(1) (making it a federal crime for a person to cross state lines to commit a crime of violence against a spouse or intimate partner); §1951(a) (federal crime to commit robbery, extortion, physical violence or threat thereof, where “article or commodity in commerce” is affected, obstructed or delayed);

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§2315 (making unlawful the knowing receipt or possession of certain stolen items that have “crossed a State . . . boundary”); §922(g)(1) (prohibiting felons from shipping, transporting, receiving, or possessing firearms “in interstate . . . commerce”).

And in a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs. See, e.g., Child Support Recovery Act of 1992, 18 U. S. C. §228. Although this possibility does not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of “An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce”? Complex Commerce Clause rules creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them. See *Wickard*, *supra*, at 120; *United States v. Darby*, 312 U. S. 100, 116–117 (1941); *Jones & Laughlin Steel Corp.*, *supra*, at 37.

The majority, aware of these difficulties, is nonetheless concerned with what it sees as an important contrary consideration. To determine the lawfulness of statutes simply by asking whether Congress could reasonably have found that *aggregated* local instances significantly affect interstate commerce will allow Congress to regulate almost anything. Virtually all local activity, when instances are aggregated, can have “substantial effects on employ-

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ment, production, transit, or consumption.” Hence Congress could “regulate any crime,” and perhaps “marriage, divorce, and childrearing” as well, obliterating the “Constitution’s distinction between national and local authority.” *Ante*, at 15; *Lopez*, 514 U. S., at 558; cf. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 548 (1935) (need for distinction between “direct” and “indirect” effects lest there “be virtually no limit to the federal power”); *Hammer v. Dagenhart*, 247 U. S. 251, 276 (1918) (similar observation).

This consideration, however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality. We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. *Heart of Atlanta Motel*, 379 U. S., at 251. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause “aggregation” rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Since judges cannot change the world, the “defect” means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 552 (1985); *ante*, at 19–24 (SOUTER, J., dissenting); *Kimel v. Florida Bd. of Regents*, 528 U. S. ___, ___ (2000) (slip op., at 2) (STEVENS, J., dissenting) (Framers designed important structural safeguards to ensure that, when Congress legislates, “the normal operation of the legislative process itself

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would adequately defend state interests from undue infringement”); see also Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000) (focusing on role of political process and political parties in protecting state interests). Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. See, e.g., Unfunded Mandates Reform Act of 1995, Pub. L. 104–4, 109 Stat. 48 (codified in scattered sections of 2 U. S. C.). Moreover, Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories. See, e.g., 42 U. S. C. §7543(b) (Clean Air Act); 33 U. S. C. §1251 *et seq.* (Clean Water Act); see also *New York v. United States*, 505 U. S. 144, 167–168 (1992) (collecting other examples of “cooperative federalism”). Not surprisingly, the bulk of American law is still state law, and overwhelmingly so.

B

I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an “are[a] of traditional state regulation.” *Ante*, at 15. And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that “[o]ur experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds.” *Id.*, at 34–36; see also Violence

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Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37–38 (1991) (unanimous resolution of the National Association of Attorneys General); but cf. Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 77–84 (1993) (Conference of Chief Justices opposing legislation).

Moreover, as JUSTICE SOUTER has pointed out, Congress compiled a “mountain of data” explicitly documenting the interstate commercial effects of gender-motivated crimes of violence. *Ante*, at 2–8, 27–28 (dissenting opinion). After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or child custody. 42 U. S. C. §13981(e)(4). Consequently, the law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem. Cf. §§300w–10, 3796gg, 3796hh, 10409, 13931 (providing federal moneys to encourage state and local initiatives to combat gender-motivated violence).

I call attention to the legislative process leading up to enactment of this statute because, as the majority recognizes, *ante*, at 14, it far surpasses that which led to the enactment of the statute we considered in *Lopez*. And even were I to accept *Lopez* as an accurate statement of the law, which I do not, that distinction provides a possible basis for upholding the law here. This Court on occasion has pointed to the importance of procedural limitations in keeping the power of Congress in check. See *Garcia, supra*, at 554 (“Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation,

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and it must be tailored to compensate for possible failings in the national political process rather than to dictate a “sacred province of state autonomy” (quoting *EEOC v. Wyoming*, 460 U. S. 226, 236 (1983)); see also *Gregory v. Ashcroft*, 501 U. S. 452, 460–461 (1991) (insisting upon a “plain statement” of congressional intent when Congress legislates “in areas traditionally regulated by the States”); cf. *Hampton v. Mow Sun Wong*, 426 U. S. 88, 103–105, 114–117 (1976); *Fullilove v. Klutznick*, 448 U. S. 448, 548–554 (1980) (STEVENS, J., dissenting).

Commentators also have suggested that the thoroughness of legislative procedures—*e.g.*, whether Congress took a “hard look”—might sometimes make a determinative difference in a Commerce Clause case, say when Congress legislates in an area of traditional state regulation. See, *e.g.*, Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2231–2245 (1998); Gardbaum, *Rethinking Constitutional Federalism*, 74 Texas L. Rev. 795, 812–828, 830–832 (1996); Lessig, *Translating Federalism: United States v. Lopez*, 1995 S. Ct. Rev. 125, 194–214 (1995); see also Treaty Establishing the European Community Art. 5; Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 331, 378–403 (1994) (arguing for similar limitation in respect to somewhat analogous principle of subsidiarity for European Community); Gardbaum, *supra*, at 833–837 (applying subsidiarity principles to American federalism). Of course, any judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority’s approach. See *supra*, at 2–7.

I continue to agree with JUSTICE SOUTER that the Court’s traditional “rational basis” approach is sufficient.

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Ante, at 1–2 (dissenting opinion); see also *Lopez*, 514 U. S., at 603–615 (SOUTER, J., dissenting); *id.*, at 615–631 (BREYER, J., dissenting). But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority’s rules and the superiority of Congress’ own procedural approach— in which case the law may evolve towards a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

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

II

Given my conclusion on the Commerce Clause question, I need not consider Congress’ authority under §5 of the Fourteenth Amendment. Nonetheless, I doubt the Court’s reasoning rejecting that source of authority. The Court points out that in *United States v. Harris*, 106 U. S. 629 (1883), and the *Civil Rights Cases*, 109 U. S. 3 (1883), the Court held that §5 does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of *private persons*. *Ante*, at 21–23. That is certainly so. The Federal Government’s argument, however, is that Congress used §5 to remedy the actions of *state actors*, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence— a failure that the States, and Congress, documented in depth. See *ante*, at 3–4, n. 7, 27–28 (SOUTER, J., dissenting) (collecting sources).

Neither *Harris* nor the *Civil Rights Cases* considered

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this kind of claim. The Court in *Harris* specifically said that it treated the federal laws in question as “directed *exclusively* against the action of private persons, without reference to the laws of the State, or their administration by her officers.” 106 U. S., at 640 (emphasis added); see also *Civil Rights Cases*, 109 U. S., at 14 (observing that the statute did “not profess to be corrective of any constitutional wrong committed by the States” and that it established “rules for the conduct of individuals in society towards each other, . . . without referring in any manner to any supposed action of the State or its authorities”).

The Court responds directly to the relevant “state actor” claim by finding that the present law lacks “congruence and proportionality” to the state discrimination that it purports to remedy. *Ante*, at 26; see *City of Boerne v. Flores*, 521 U. S. 507, 526 (1997). That is because the law, unlike federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally discriminated in jury selection, *Katzenbach v. Morgan*, 384 U. S. 641 (1966); *South Carolina v. Katzenbach*, 383 U. S. 301 (1966); *Ex parte Virginia*, 100 U. S. 339 (1880), is not “directed . . . at any State or state actor.” *Ante*, at 26.

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial “[l]egislation . . . [that] prohibits conduct which is not itself unconstitutional.” *Flores*, 521 U. S., at 518; see also *Katzenbach v. Morgan*, *supra*, at 651; *South Carolina v. Katzenbach*, *supra*, at 308. The statutory remedy does not in any sense purport to “determine what constitutes a constitutional violation.” *Flores*, *supra*, at 519. It intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by

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imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy “disproportionate”? And given the relation between remedy and violation— the creation of a federal remedy to substitute for constitutionally inadequate state remedies— where is the lack of “congruence”?

The majority adds that Congress found that the problem of inadequacy of state remedies “does not exist in all States, or even most States.” *Ante*, at 27. But Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. See, *e.g.*, S. Rep. No. 103–138, pp. 38, 41–42, 44–47 (1993); S. Rep. No. 102–197, pp. 39, 44–49 (1991); H. R. Conf. Rep. No. 103–711, p. 385 (1994). The record nowhere reveals a congressional finding that the problem “does not exist” elsewhere. Why can Congress not take the evidence before it as evidence of a national problem? This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution. And the deference this Court gives to Congress’ chosen remedy under §5, *Flores*, *supra*, at 536, suggests that any such requirement would be inappropriate.

Despite my doubts about the majority’s §5 reasoning, I need not, and do not, answer the §5 question, which I would leave for more thorough analysis if necessary on another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the “necessary and proper” exercise of legislative power granted to Congress by that Clause.