SUPREME COURT OF THE UNITED STATES

Nos. 99–5 and 99–29

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

CHRISTY BRZONKALA, PETITIONER
99–29 *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 SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U. S. C. §13981, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.[1]

I

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard* v. *Filburn*, 317 U. S. 111, 124–128 (1942); *Hodel* v. *Virginia Surface Mining & Reclamation*

[1] Finding the law a valid exercise of Commerce Clause power, I have no occasion to reach the question whether it might also be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.

Assn., 452 U. S. 264, 277 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, *ibid.*, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See *ibid.* Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States* v. *Lopez*, 514 U. S. 549 (1995), is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce.[2] Passage of the Act in 1994 was preceded by four years of hearings,[3] which in-

– – – – – –

[2] It is true that these data relate to the effects of violence against women generally, while the civil rights remedy limits its scope to "crimes of violence motivated by gender"– presumably a somewhat narrower subset of acts. See 42 U. S. C. §13981(b). But the meaning of "motivated by gender" has not been elucidated by lower courts, much less by this one, so the degree to which the findings rely on acts not redressable by the civil rights remedy is unclear. As will appear, however, much of the data seems to indicate behavior with just such motivation. In any event, adopting a cramped reading of the statutory text, and thereby increasing the constitutional difficulties, would directly contradict one of the most basic canons of statutory interpretation. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937). Having identified the problem of violence against women, Congress may address what it sees as the most threatening manifestation; "reform may take one step at a time." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 489 (1955).

[3] See, *e.g.*, Domestic Violence: Terrorism in the Home, Hearing before

cluded testimony from physicians and law professors;[4] from survivors of rape and domestic violence;[5] and from representatives of state law enforcement and private business.[6] The record includes reports on gender bias from task forces in 21 States,[7] and we have the benefit of

– – – – – –

the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (1990) (S. Hearing 101–897); Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. (1991) (S. Hearing 102–369); Violence Against Women, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992); Hearing on Domestic Violence, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103–596); Violent Crimes Against Women, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103–726); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103–878); 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. (1993); Domestic Violence: Not Just a Family Matter, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 103d Cong., 2d Sess. (1994).

[4] See, *e.g.,* S. Hearing 103–596, at 1–4 (testimony of Northeastern Univ. Law School Professor Clare Dalton); S. Hearing 102–369, at 103–105 (testimony of Univ. of Chicago Professor Cass Sunstein); S. Hearing 103–878, at 7–11 (testimony of American Medical Assn. president-elect Robert McAfee).

[5] See, *e.g., id.,* at 13–17 (testimony of Lisa); *id.* at 40–42 (testimony of Jennifer Tescher).

[6] See, *e.g.,* S. Hearing 102–369, at 24–36, 71–87 (testimony of attorneys general of Iowa and Illinois); *id.,* at 235–245 (testimony of National Federation of Business and Professional Women); S. Hearing No. 103–596, at 15–17 (statement of James Hardeman, Manager, Counseling Dept., Polaroid Corp.).

[7] See Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the

specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment.[8] Compare *Hodel*, 452 U. S.,

– – – – – –

California Courts (July 1996) (edited version of 1990 report); Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender and Justice in the Colorado Courts (1990); Connecticut Task Force on Gender, Justice and the Courts, Report to the Chief Justice (Sept. 1991); Report of the Florida Supreme Court Gender Bias Study Commission (Mar. 1990); Supreme Court of Georgia, Commission on Gender Bias in the Judicial System, Gender and Justice in the Courts (1991), reprinted in 8 Ga. St. U. L. Rev. 539 (1992); Report of the Illinois Task Force on Gender Bias in the Courts (1990); Equality in the Courts Task Force, State of Iowa, Final Report (Feb. 1993); Kentucky Task Force on Gender Fairness in the Courts, Equal Justice for Women and Men (Jan. 1992); Louisiana Task Force on Women in the Courts, Final Report (1992); Maryland Special Joint Comm., Gender Bias in the Courts (May 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 (Dec. 1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989), reprinted in 15 Wm. Mitchell L. Rev. 825 (1989); Nevada Supreme Court Gender Bias Task Force, Justice For Women (1988); New Jersey Supreme Court Task Force on Women in the Courts, Report of the First Year (June 1984); Report of the New York Task Force on Women in the Courts (Mar. 1986); Final Report of the Rhode Island Supreme Court Committee on Women in the Courts (June 1987); Utah Task Force on Gender and Justice, Report to the Utah Judicial Council (Mar. 1990); Vermont Supreme Court and Vermont Bar Assn., Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System (Jan. 1991); Washington State Task Force on Gender and Justice in the Courts, Final Report (1989); Wisconsin Equal Justice Task Force, Final Report (Jan. 1991).

[8] See S. Rep. No. 101–545 (1990); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: The Increase of Rape in America, 102d Cong., 1st Sess. (Comm. Print 1991); S. Rep. No. 102–197 (1991); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: A Week in the Life of America, 102d Cong., 2d Sess. (Comm. Print 1992); S. Rep. No. 103–138 (1993); Majority Staff of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess. (Comm. Print 1993); H. R. Rep. No. 103–395 (1993); H. R. Conf. Rep. No. 103–711 (1994).

at 278–279 (noting "extended hearings," "vast amounts of testimony and documentary evidence," and "years of the most thorough legislative consideration").

With respect to domestic violence, Congress received evidence for the following findings:

> "Three out of four American women will be victims of violent crimes sometime during their life." H. R. Rep. No. 103–395 p. 25 (1993) (citing U. S. Dept. of Justice, Report to the Nation on Crime and Justice 29 (2d ed. 1988)).
>
> "Violence is the leading cause of injuries to women ages 15 to 44 . . . ." S. Rep. No. 103–138, p. 38 (1993) (citing Surgeon General Antonia Novello, From the Surgeon General, U. S. Public Health Services, 267 JAMA 3132 (1992)).
>
> "[A]s many as 50 percent of homeless women and children are fleeing domestic violence." S. Rep. No. 101–545, p. 37 (1990) (citing E. Schneider, Legal Reform Efforts for Battered Women: Past, Present, and Future (July 1990)).
>
> "Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others." S. Rep. No. 101–545, at 30 (citing Bureau of Justice Statistics, Criminal Victimization in the United States (1974) (Table 5)).
>
> "[B]attering 'is the single largest cause of injury to women in the United States.'" S. Rep. No. 101–545, at 37 (quoting Van Hightower & McManus, Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies, 49 Pub. Admin. Rev. 269 (May/June 1989).
>
> "An estimated 4 million American women are battered each year by their husbands or partners." H. R. Rep. No. 103–395, at 26 (citing Council on Scientific

> Affairs, American Medical Assn., Violence Against Women: Relevance for Medical Practitioners, 267 JAMA 3184, 3185 (1992).
>
> "Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners." S. Rep. No. 101–545, at 37 (citing Stark & Flitcraft, Medical Therapy as Repression: The Case of the Battered Woman, Health & Medicine (Summer/Fall 1982).
>
> "Between 2,000 and 4,000 women die every year from [domestic] abuse." S. Rep. No. 101–545, at 36 (citing Schneider, *supra*).
>
> "[A]rrest rates may be as low as 1 for every 100 domestic assaults." S. Rep. No. 101–545, at 38 (citing Dutton, Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis, 3 Violence and Victims 5–30 (1988)).
>
> "Partial estimates show that violent crime against women costs this country at least 3 billion– not million, but billion– dollars a year." S. Rep. No. 101–545, at 33 (citing Schneider, *supra*, at 4).
>
> "[E]stimates 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 (citing Biden, Domestic Violence: A Crime, Not a Quarrel, Trial 56 (June 1993)).

The evidence as to rape was similarly extensive, supporting these conclusions:

> "[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years." S. Rep. No. 101–545, at 30 (citing Federal Bureau of Investigation Uniform Crime Reports (1988)).
>
> "According to one study, close to half a million girls now in high school will be raped before they graduate." S. Rep. No. 101–545, at 31 (citing R. Warshaw, I

Never Called it Rape 117 (1988)).

"[One hundred twenty-five thousand] college women can expect to be raped during this– or any– year." S. Rep. No. 101–545, at 43 (citing testimony of Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990).

"[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason." S. Rep. No. 102–197, p. 38 (1991) (citing M. Gordon & S. Riger, The Female Fear 15 (1989)).

"[Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims." S. Rep. No. 102–197, at 47 (citing Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender Justice in the Colorado Courts 91 (1990)).

"Less than 1 percent of all [rape] victims have collected damages." S. Rep. No. 102–197, at 44 (citing report by Jury Verdict Research, Inc.).

"'[A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.'" S. Rep. No. 101–545, at 33, n. 30 (quoting H. Feild & L. Bienen, Jurors and Rape: A Study in Psychology and Law 95 (1980)).

"Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months." S. Rep. No. 103–138, at 38 (citing Majority Staff Report of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess., 2 (Comm. Print 1993)).

"[A]lmost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." S. Rep. No. 102–197, at 53 (citing Ellis, Atkeson, &

> Calhoun, An Assessment of Long-Term Reaction to Rape, 90 J. Abnormal Psych., No. 3, p. 264 (1981).

Based on the data thus partially summarized, 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, p. 385 (1994).

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. Cf. *Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180, 199 (1997) ("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process").

Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. In *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241 (1964), and *Katzenbach* v. *McClung,* 379 U. S. 294 (1964), the Court referred to evidence showing the consequences of racial discrimination by motels and restaurants on interstate commerce. Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars. See Civil

Rights— Public Accommodations, Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., App. V, pp. 1383–1387 (1963). Congress also had evidence that the average black family spent substantially less than the average white family in the same income range on public accommodations, and that discrimination accounted for much of the difference. H. R. Rep. No. 88–914, pt. 2, pp. 9–10, and Table II (1963) (Additional Views on H. R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell).

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of $3 billion in 1990, see S. Rep. 101–545, and $5 to $10 billion in 1993, see S. Rep. No. 103–138, at 41.[9] Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "[g]ender-based violence bars its most likely targets— women— from full partic[ipation] in the national economy." *Id.*, at 54.

If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In *Wickard*, we upheld the application of the Agricultural Adjustment Act to the planting and consumption of home-grown wheat. The effect on interstate commerce in that

– – – – – –

[9] In other cases, we have accepted dramatically smaller figures. See, *e.g.*, *Hodel* v. *Indiana*, 452 U. S. 314, 325, n. 11 (1981) (stating that corn production with a value of $5.16 million "surely is not an insignificant amount of commerce").

case followed from the possibility that wheat grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. See 317 U. S., at 127–129. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, see S. Rep. No. 101–545, at 36, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit, see *id.*, at 56, H. R. Rep. No. 103–395, at 25–26. Violence against women may be found to affect interstate commerce and affect it substantially.[10]

II

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional

---

[10] It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. See Hearings before a Subcommittee of the House Committee on Appropriations, 104th Cong., 1st Sess., pt. 7, pp. 13–14 (1995) (testimony of JUSTICE KENNEDY); Hearings on H. R. 4603 before a Subcommittee of the Senate Committee on Appropriations, 103d Cong., 2d Sess., 100–107 (1994) (testimony of JUSTICES KENNEDY and SOUTER). The Judicial Conference of the United States originally opposed the Act, though after the original bill was amended to include the gender-based animus requirement, the objection was withdrawn for reasons that are not apparent. See 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., 70–71 (1993).

power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I. §8 cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta, supra,* at 258; *McClung, supra,* at 301–305, but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrong[s]," *Heart of Atlanta, supra,* at 257.

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." *Ante,* at 14. This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 195 (1824); *ante*, at 10; The Federalist No. 45, p. 313 (J. Cooke ed. 1961) (J. Madison).[11] The majority stresses that Art. I, §8, enumerates the powers of Congress, including the commerce power, an enumeration implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to "commerce," but that some particular subjects arguably within the commerce power can be identified in advance

– – – – – –

[11] The claim that powers not granted were withheld was the chief Federalist argument against the necessity of a bill of rights. Bills of rights, Hamilton claimed, "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." The Federalist No. 84, at 578. James Wilson went further in the Pennsylvania ratifying convention, asserting that an enumeration of rights was positively dangerous because it suggested, conversely, that every right not reserved was surrendered. See 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 436–437 (2d ed. 1863) (hereinafter Elliot's Debates). The Federalists did not, of course, prevail on this point; most States voted for the Constitution only after proposing amendments and the First Congress speedily adopted a Bill of Rights. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 569 (1985) (Powell, J., dissenting). While that document protected a range of specific individual rights against federal infringement, it did not, with the possible exception of the Second Amendment, offer any similarly specific protections to areas of state sovereignty.

as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation, see *Lopez*, 514 U. S., at 566. *Ante*, at 16.

The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, §8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress.[12] My disagreement with the majority is not, however, confined to logic, for history has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

– – – – – –

[12] To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme. See, *e.g.*, *Lake Shore & Michigan Southern R. Co.* v. *Ohio*, 173 U. S. 285, 297–298 (1899) ("When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government"); *United States* v. *California*, 297 U. S. 175, 185 (1936) ("[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce").

A

Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare "noncommercial" primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in the light of the final sentence of Article I, §8, authorizing Congress to make "all Laws . . . necessary and proper" to give effect to its enumerated powers such as commerce. See *United States* v. *Darby*, 312 U. S. 100, 118 (1941) ("The power of Congress . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce"). Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition summons up familiar history, a brief reprise of which may be helpful in posing what I take to be the key question going to the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation.

Chief Justice Marshall's seminal opinion in *Gibbons* v. *Ogden*, *supra*, at 193–194, construed the commerce power from the start with "a breadth never yet exceeded," *Wickard* v. *Filburn*, 317 U. S., at 120. In particular, it is worth noting, the Court in *Wickard* did not regard its holding as exceeding the scope of Chief Justice Marshall's view of interstate commerce; *Wickard* applied an aggre-

gate effects test to ostensibly domestic, noncommercial farming consistently with Chief Justice Marshall's indication that the commerce power may be understood by its exclusion of subjects, among others, "which do not affect other States," *Gibbons,* 9 Wheat., at 195. This plenary view of the power has either prevailed or been acknowledged by this Court at every stage of our jurisprudence. See, *e.g., id.,* at 197; *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96, 99–100 (1888); *Lottery Case,* 188 U. S. 321, 353 (1903); *Minnesota Rate Cases,* 230 U. S. 352, 398 (1913); *United States* v. *California,* 297 U. S. 175, 185 (1936); *United States* v. *Darby,* 312 U. S. 100, 115 (1941); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S., at 255; *Hodel* v. *Indiana,* 452 U. S., at 324. And it was this understanding, free of categorical qualifications, that prevailed in the period after 1937 through *Lopez,* as summed up by Justice Harlan: "'Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.'" *Maryland* v. *Wirtz,* 392 U. S. 183, 190 (1968) (quoting *Katzenbach* v. *McClung,* 379 U. S., at 303–304).

Justice Harlan spoke with the benefit of hindsight, for he had seen the result of rejecting the plenary view, and today's attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed comes with the pedigree of near-tragedy that I outlined in *United States* v. *Lopez, supra,* at 603 (dissenting opinion). In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional

reach by declaring such activities as "mining," "production," "manufacturing," and union membership to be outside the definition of "commerce" and by limiting application of the effects test to "direct" rather than "indirect" commercial consequences. See, *e.g.*, *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between "commerce" and "manufacture"); *In re Heff*, 197 U. S. 488, 505–506 (1905) (stating that Congress could not regulate the intrastate sale of liquor); *The Employers' Liability Cases*, 207 U. S. 463, 495–496 (1908) (invalidating law governing tort liability for common carriers operating in interstate commerce because the effects on commerce were indirect); *Adair* v. *United States*, 208 U. S. 161 (1908) (holding that labor union membership fell outside "commerce"); *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of "manufacture"); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 545–548 (1935) (invalidating regulation of activities that only "indirectly" affected commerce); *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 368–369 (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 303–304 (1936) (holding that regulation of unfair labor practices in mining regulated "production," not "commerce").

Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today's

decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard*, which repudiated that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, see *Lopez*, *supra*, at 580 (opinion of KENNEDY, J.), is cousin to the intent-based analysis employed in *Hammer*, *supra*, at 271–272 but rejected for Commerce Clause purposes in *Heart of Atlanta*, *supra*, at 257 and *Darby*, *supra*, at 115.

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was not "commerce" in the common vocabulary,[13] but that did not matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially.

– – – – – –

[13] Contrary to the Court's suggestion, *ante*, at 11, n. 4, *Wickard* applied the substantial effects test to domestic agricultural production for domestic consumption, an activity that cannot fairly be described as commercial, despite its commercial consequences in affecting or being affected by the demand for agricultural products in the commercial market. The *Wickard* Court admitted that Filburn's activity "may not be regarded as commerce" but insisted that "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." 317 U. S., at 125. The characterization of home wheat production as "commerce" or not is, however, ultimately beside the point. For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial? Cf., *e.g.*, *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 258 (1994) ("An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives"). The Court's answer is that it makes a difference to federalism, and the legitimacy of the Court's new judicially derived federalism is the crux of our disagreement. See *infra*, at 18–19.

Just a few years before *Wickard*, however, it had certainly been no less obvious that "mining" practices could substantially affect commerce, even though *Carter Coal Co.*, *supra*, had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. See *Lopez*, *supra*, at 605–606 (SOUTER, J., dissenting). The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere

of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. This conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test.

B

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities. *Ante*, at 9. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once. It was disapproved in *Darby*, 312 U. S., at 123–124, and held insufficient standing alone to limit the commerce power in *Hodel*, 452 U. S., at 276–277. In the particular context of the Fair Labor Standards Act it was rejected in *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), with the recognition that "[t]here is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." *Id.*, at 195 (internal quotation marks omitted). The Court held it to be "clear that the Federal Government, when acting within delegated power, may override countervailing state interests, whether these

be described as 'governmental' or 'proprietary' in character." *Ibid.* While *Wirtz* was later overruled by *National League of Cities* v. *Usery,* 426 U. S. 833 (1976), that case was itself repudiated in *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528 (1985), which held that the concept of "traditional governmental function" (as an element of the immunity doctrine under *Hodel*) was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other. 469 U. S., at 546–547. The effort to carve out inviolable state spheres within the spectrum of activities substantially affecting commerce was, of course, just as irreconcilable with *Gibbons*'s explanation of the national commerce power as being as "absolut[e] as it would be in a single government," 9 Wheat., at 197.[14]

– – – – – –

[14] The Constitution of 1787 did, in fact, forbid some exercises of the commerce power. Article I, §9, cl. 6, barred Congress from giving preference to the ports of one State over those of another. More strikingly, the Framers protected the slave trade from federal interference, see Art. I, §9, cl. 1, and confirmed the power of a State to guarantee the chattel status of slaves who fled to another State, see Art. IV, §2, cl. 3. These reservations demonstrate the plenary nature of the federal power; the exceptions prove the rule. Apart from them, proposals to carve islands of state authority out of the stream of commerce power were entirely unsuccessful. Roger Sherman's proposed definition of federal legislative power as excluding "matters of internal police" met Gouverneur Morris's response that "[t]he internal police . . . ought to be infringed in many cases" and was voted down eight to two. 2 Records of the Federal Convention of 1787, pp. 25–26 (M. Farrand ed. 1911) (hereinafter Farrand). The Convention similarly rejected Sherman's attempt to include in Article V a proviso that "no state shall . . . be affected in its internal police." 5 Elliot's Debates 551–552. Finally, Rufus King suggested an explicit bill of rights for the States, a device that might indeed have set aside the areas the Court now declares off-limits. 1 Farrand 493 ("As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitu-

The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.[15] Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

Although Madison had emphasized the conception of a National Government of discrete powers (a conception that a number of the ratifying conventions thought was too indeterminate to protect civil liberties),[16] Madison himself

– – – – – –

tion"). That proposal, too, came to naught. In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by the substantial effects test is to deny our constitutional history.

[15] That the national economy and the national legislative power expand in tandem is not a recent discovery. This Court accepted the prospect well over 100 years ago, noting that the commerce powers "are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9 (1878). See also, *e.g.*, *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 211–212 (1930) ("Primitive conditions have passed; business is now transacted on a national scale").

[16] As mentioned n. 11, *supra*, many state conventions voted in favor of the Constitution only after proposing amendments. See 1 Elliot's De-

must have sensed the potential scope of some of the powers granted (such as the authority to regulate commerce), for he took care in The Federalist No. 46 to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, at 319. James Wilson likewise noted that "it was a favorite object in the Convention" to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal Government. 2 Elliot's Debates 438–439.[17] The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth Amendment without any provision comparable to the specific guarantees proposed for individual liberties.[18] In any case, this Court recognized the political component of

– – – – – –

bates 322–323 (Massachusetts), 325 (South Carolina), 325–327 (New Hampshire), 327 (Virginia), 327–331 (New York), 331–332 (North Carolina), 334–337 (Rhode Island).

[17] Statements to similar effect pervade the ratification debates. See, *e.g.*, 2 *id.*, at 166–170 (Massachusetts, remarks of Samuel Stillman); *id.*, at 251–253 (New York, remarks of Alexander Hamilton); 4 *id.*, at 95–98 (North Carolina, remarks of James Iredell).

[18] The majority's special solicitude for "areas of traditional state regulation," *ante*, at 15, is thus founded not on the text of the Constitution but on what has been termed the "*spirit* of the Tenth Amendment," *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S., at 585 (O'CONNOR, J., dissenting) (emphasis in original). Susceptibility to what Justice Holmes more bluntly called "some invisible radiation from the general terms of the Tenth Amendment," *Missouri* v. *Holland*, 252 U. S. 416, 434 (1920), has increased in recent years, in disregard of his admonition that "[w]e must consider what this country has become in deciding what that Amendment has reserved." *Ibid.*

federalism in the seminal *Gibbons* opinion. After declaring the plenary character of congressional power within the sphere of activity affecting commerce, the Chief Justice spoke for the Court in explaining that there was only one restraint on its valid exercise:

> "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons, supra,* at 197.

Politics as the moderator of the congressional employment of the commerce power was the theme many years later in *Wickard,* for after the Court acknowledged the breadth of the *Gibbons* formulation it invoked Chief Justice Marshall yet again in adding that "[h]e made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard,* 317 U. S., at 120 (citation omitted). Hence, "conflicts of economic interest . . . are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." *Id.,* at 129 (footnote omitted).

As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics. The point can be put no more clearly than the Court put it the last time it repudiated the notion that some state activities categorically defied the commerce power as understood in accordance with generally ac-

cepted concepts. After confirming Madison's and Wilson's views with a recitation of the sources of state influence in the structure of the National Constitution, *Garcia*, 469 U. S., at 550–552, the Court disposed of the possibility of identifying "principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty," *id.*, at 548. It concluded that

> "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.*, at 552.

The *Garcia* Court's rejection of "judicially created limitations" in favor of the intended reliance on national politics was all the more powerful owing to the Court's explicit recognition that in the centuries since the framing the relative powers of the two sovereign systems have markedly changed. Nationwide economic integration is the norm, the national political power has been augmented by its vast revenues, and the power of the States has been drawn down by the Seventeenth Amendment, eliminating selection of senators by state legislature in favor of direct election.

The *Garcia* majority recognized that economic growth and the burgeoning of federal revenue have not amended the Constitution, which contains no circuit breaker to preclude the political consequences of these developments. Nor is there any justification for attempts to nullify the natural political impact of the particular amendment that was adopted. The significance for state political power of

ending state legislative selection of senators was no secret in 1913, and the amendment was approved despite public comment on that very issue. Representative Franklin Bartlett, after quoting Madison's Federalist No. 62, as well as remarks by George Mason and John Dickinson during the Constitutional Convention, concluded, "It follows, therefore, that the framers of the Constitution, were they present in this House to-day, would inevitably regard this resolution as a most direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance." 26 Cong. Rec. 7774 (1894). Massachusetts Senator George Hoar likewise defended indirect election of the Senate as "a great security for the rights of the States." S. Doc. No. 232, 59th Cong., 1st Sess., 21 (1906). And Elihu Root warned that if the selection of senators should be taken from state legislatures, "the tide that now sets toward the Federal Government will swell in volume and power." 46 Cong. Rec. 2243 (1911). "The time will come," he continued, "when the Government of the United States will be driven to the exercise of more arbitrary and unconsidered power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States." *Ibid*. These warnings did not kill the proposal; the Amendment was ratified, and today it is only the ratification, not the predictions, which this Court can legitimately heed.[19]

– – – – – –

[19] The majority tries to deflect the objection that it blocks an intended political process by explaining that the Framers intended politics to set the federal balance only within the sphere of permissible commerce legislation, whereas we are looking to politics to define that sphere (in derogation even of *Marbury* v. *Madison*, 1 Cranch 137 (1803)), *ante*, at 16–17. But we all accept the view that politics is the arbiter of state interests only within the realm of legitimate congressional action under

Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs. The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power.

C

The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now-repudiated opinion for the Court in *Usery*. In explaining that there

– – – – – –

the commerce power. Neither Madison nor Wilson nor Marshall, nor the *Jones* & *Laughlin*, *Darby*, *Wickard*, or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary world result in a vastly greater sphere of influence for politics than the Framers would have envisioned. Politics has legitimate authority, for all of us on both sides of the disagreement, only within the legitimate compass of the commerce power. The majority claims merely to be engaging in the judicial task of patrolling the outer boundaries of that congressional authority. See *ante*, at 16, n. 7. That assertion cannot be reconciled with our statements of the substantial effects test, which have not drawn the categorical distinctions the majority favors. See, *e.g.*, *Wickard*, 317 U. S., at 125; *Darby*, 312 U. S., at 118–119. The majority's attempt to circumscribe the commerce power by defining it in terms of categorical exceptions can only be seen as a revival of similar efforts that led to near tragedy for the Court and incoherence for the law. If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally dealt with it, should be a political choice and only a political choice.

was no inconsistency between declaring the States immune to the commerce power exercised in the Fair Labor Standards Act, but subject to it under the Economic Stabilization Act of 1970, as decided in *Fry* v. *United States*, 421 U. S. 542 (1975), the Court spoke of the latter statute as dealing with a serious threat affecting all the political components of the federal system, "which only collective action by the National Government might forestall." *Usery*, 426 U. S., at 853. Today's majority, however, finds no significance whatever in the state support for the Act based upon the States' acknowledged failure to deal adequately with gender-based violence in state courts, and the belief of their own law enforcement agencies that national action is essential.[20]

The National Association of Attorneys General supported the Act unanimously, see Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37–38 (1991), and Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy, representing that "the current system for dealing with violence against women is inadequate," see 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., 34–36 (1993). It was against this record of failure at the state level that the Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence. See Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st

– – – – – –

[20] See n. 7, *supra*. The point here is not that I take the position that the States are incapable of dealing adequately with domestic violence if their political leaders have the will to do so; it is simply that the Congress had evidence from which it could find a national statute necessary, so that its passage obviously survives Commerce Clause scrutiny.

Cong., 2d Sess., 2 (1990) (statement of Sen. Biden) (noting importance of federal forum).[21] The Act accordingly offers a federal civil rights remedy aimed exactly at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces. See S. Rep. No. 101–545, at 45 (noting difficulty of fitting gender-motivated crimes into common-law categories). As the 1993 Senate Report put it, "The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical . . . ." S. Rep. No. 103–138, at 38.

The collective opinion of state officials that the Act was needed continues virtually unchanged, and when the Civil Rights Remedy was challenged in court, the States came to its defense. Thirty-six of them and the Commonwealth of Puerto Rico have filed an *amicus* brief in support of petitioners in these cases, and only one State has taken respondents' side. It is, then, not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not. For with the Court's decision today, Antonio Morrison, like *Carter Coal*'s James Carter before him, has "won the states' rights plea against the states themselves." R. Jackson, The Struggle for Judicial Supremacy 160 (1941).

– – – – – –

[21] The majority's concerns about accountability strike me as entirely misplaced. Individuals, such as the defendants in this action, haled into federal court and sued under the United States Code, are quite aware of which of our dual sovereignties is attempting to regulate their behavior. Had Congress chosen, in the exercise of its powers under §5 of the Fourteenth Amendment, to proceed instead by regulating the States, rather than private individuals, this accountability would be far less plain.

III

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal*, *Schechter*, and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup* v. *New York*, 386 U. S. 767 (1967) *(per curiam)*, and *Miller* v. *California*, 413 U. S. 15 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. See *id.*, at 22, n. 3; *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 706–708 (1968) (Harlan, J., dissenting). As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "[t]he first call of a theory of law is that it should fit the facts." O. Holmes, The Common Law 167 (Howe ed. 1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts

today than the theory of laissez-faire was able to govern the national economy 70 years ago.