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## Commerce Clause Challenges Spawned by *United States v. Lopez* Are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate Over How the VAWA Will Fare in the Wake of *Lopez*

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BY *UNITED STATES V. LOPEZ* ARE DOING  
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WOMEN ACT (VAWA): A SURVEY OF CASES  
AND THE ONGOING DEBATE OVER HOW THE  
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# COMMERCE CLAUSE CHALLENGES SPAWNED BY *UNITED STATES V. LOPEZ* ARE DOING VIOLENCE TO THE VIOLENCE AGAINST WOMEN ACT (VAWA): A SURVEY OF CASES AND THE ONGOING DEBATE OVER HOW THE VAWA WILL FARE IN THE WAKE OF *LOPEZ*

Violence is the leading cause of injury to women ages 15-44, more common than automobile accidents, muggings, and cancer deaths combined.<sup>1</sup>

Every week, during 1991, more than 2,000 women were raped and more than 90 women were murdered.<sup>2</sup>

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.<sup>3</sup>

Studies have reported that 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity.<sup>4</sup>

## I. INTRODUCTION

On September 14, 1994, in response to and in recognition of the epidemic of violence against women in the United States, Congress enacted the Violence Against Women Act (VAWA).<sup>5</sup> The VAWA is a comprehensive statute designed to provide women<sup>6</sup> greater protection from and recourse against violence and to impose accountability on abusers and those who commit crimes of violence based on gender animus.<sup>7</sup> The VAWA, which contains seven parts, creates new federal crimes, strengthens penalties for existing federal sex crimes, and provides \$1.6 billion over six years for education, research, treatment of domestic and sex crime victims, and the improvement of state criminal justice systems.<sup>8</sup> Title III of the Act (civil rights provision) creates a

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1. S. REP. NO. 103-138, at 38 (1993) (citing Surgeon General Antonio Novello, *From the Surgeon General, U.S. Public Health Services*, 267 JAMA 3132 (1992)).

2. *Id.*

3. *Id.*

4. S. REP. NO. 102-197, at 39 (1991).

5. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 28, and 42 U.S.C. (1994)).

6. Technically, any person victimized by a crime motivated by gender, as defined by the VAWA, may utilize the VAWA civil rights remedy. In creating this cause of action, however, Congress focused on rape and domestic violence against women. *See generally* H.R. REP. NO. 103-395 (1993); S. REP. NO. 103-138 (1993); S. REP. NO. 102-197 (1991); S. REP. NO. 101-545 (1990).

7. *See* Violence Against Women Act §§ 4001-40703, 108 Stat. 1902, 1903-55.

8. Subtitle A, "Safe Streets for Women," increases penalties for repeat sexual abusers, authorizes appropriation of funds to increase safety for women on public transportation, and creates a Department of Justice task force. *See id.* §§ 40101-40156, 108 Stat. at 1902-24. Subtitle B, "Safe Homes for Women," creates new federal domestic violence crimes, requires that full faith and credit be given to protection orders from other states, and mandates restitution for federal crimes. *See id.*

positive statutory right for all individuals to be free from gender-motivated violence and provides a civil remedy so that individuals who have been denied that right can recover damages.<sup>9</sup>

The VAWA was passed after four years of congressional hearings, which chronicled the harmful effects of violence against women on the national economy.<sup>10</sup> For example, in its final report on the VAWA, the Senate concluded that "Gender-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."<sup>11</sup> Congress rooted the constitutionality of the VAWA in its enumerated powers<sup>12</sup> under both

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§§ 40201-40295, 108 Stat. at 1925-42. Subtitle B also authorizes appropriation of millions of dollars for shelters, youth education programs, and proliferation of pro-arrest policies. *See id.* Subtitle C, "Civil Rights for Women," creates a civil right to be free from gender-based violence and provides a civil remedy. *See id.* §§ 40301-40304, 108 Stat. at 1941-42. Subtitle D, "Equal Justice for Women in the Courts," authorizes funding to train judges in combating gender bias in the courts. *See id.* §§ 40401-40422, 108 Stat. at 1942-45. Subtitle E, "Violence Against Women Act Improvements," authorizes funding to increase safety on college campuses, requires a government report on battered women's syndrome, and allows for enforcement of restitution orders through suspension of federal benefits. *See id.* §§ 40501-40509, 108 Stat. at 1945-50. Subtitle F, "National Stalker and Domestic Violence Reduction," authorizes increased access to national crime information regarding stalking and domestic violence offenders. *See id.* §§ 40601-40611, 108 Stat. at 1950-53. Finally, Subtitle G, "Protections for Battered Immigrant Women and Children," addresses the special protection needs of battered immigrant women and children. *See id.* §§ 40701-40702, 108 Stat. at 1953-55.

9. *See* 42 U.S.C. § 13981(b) (1994) (proclaiming that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender"). Subsection (c) provides a remedy for violations of that right. *See id.* § 13981(c). Challenges to this provision of the VAWA will be the focus of this Comment. Although the provisions of the VAWA are subtitles, they are commonly referred to as titles. Thus, this Author refers to the civil rights provision as Title III.

10. These hearings include: *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. (1993); *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. (1992); *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. (1990); *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong. (1990).

11. S. REP. NO. 103-138, at 54 (1993). The House Conference made similar findings, stating that

[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 [sic], 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.

*See* H.R. CONF. REP. NO. 103-711, at 385 (1994).

12. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in [the] Congress . . ."); *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) ("This [federal] government is

the Commerce Clause and section five of the Fourteenth Amendment.<sup>13</sup> In doing so, Congress stated that "[a] federal civil rights action . . . is necessary to guarantee equal protection of the laws and to reduce the substantial adverse effects on interstate commerce caused by crimes of violence motivated by gender."<sup>14</sup>

In 1994, when Congress passed the VAWA, the United States Supreme Court had not invalidated legislation relying on Congress's Commerce Clause power in nearly sixty years.<sup>15</sup> Soon after the VAWA's enactment, however, Congress's power under the Commerce Clause was restricted by the Supreme Court in *United States v. Lopez*.<sup>16</sup> In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990 (GFSZA),<sup>17</sup> which prohibited "any individual knowingly to possess a firearm at a place that person knows, or has reasonable cause to believe, is a school zone."<sup>18</sup> The Court determined that, in enacting the GFSZA, Congress had exceeded the outer limits of its power under the Commerce Clause.<sup>19</sup>

*Lopez* revived and invigorated the long-running debate over the reach of Congress's power under the Commerce Clause. The Supreme Court acknowledged that certain aspects of *Lopez* would result in legal uncertainty.<sup>20</sup> Indeed, that prediction has come to pass. Since 1995, the potential reach of the *Lopez* decision has been widely debated.<sup>21</sup> Individuals named in civil suits or charged under federal statutes enacted pursuant to Congress's Commerce Clause power have, not surprisingly,

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acknowledged by all, to be one of enumerated powers."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-1, at 224 (1978) ("Congress is thus a legislative body possessing only limited powers—those granted to it by the Constitution.").

13. The Commerce Clause provides Congress with authority "[t]o regulate Commerce with foreign nations, and among the several states . . ." U.S. CONST. art. I, § 8, cl. 3. The Fourteenth Amendment states, in pertinent 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 that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.

14. H.R. REP. NO. 103-711, at 922 (1994).

15. The 1935 decision in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549-50 (1935), was the last time the Supreme Court limited Congress's Commerce Clause authority, except for *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was subsequently overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985).

16. 514 U.S. 549 (1995).

17. 18 U.S.C. § 922(q) (1990).

18. *Id.*

19. See *United States v. Lopez*, 514 U.S. at 551, 557.

20. See *id.* at 566. The Court acknowledged that determining whether an activity is commercial or noncommercial can result in legal uncertainty, but said that uncertainty always results when determining the limits of constitutionally enumerated powers. See *id.*

21. See, e.g., *United States v. Chesney*, 86 F.3d 564, 580 n.11 (6th Cir. 1996) (Batchelder, J., concurring) (stating that "*Lopez* presages a return to the day when Congress's interstate commerce authority had meaningful limits"); *United States v. Bishop*, 66 F.3d 569, 591 n.1, 603 (3d Cir. 1995) (Becker, J., dissenting) (stating that *Lopez* was not just another Supreme Court case but a watershed "that shifted the outer boundary of the Commerce Clause"). Based on a Westlaw search, since it was decided on April 26, 1995, *Lopez* has been cited in over 1300 reported decisions.

exploited this uncertainty.<sup>22</sup> Those facing suits under the VAWA are no different. To date, there have been constitutional challenges made in almost every reported case arising under the civil rights provision of the Act. Judicial responses to these challenges have varied, ranging from: upholding the constitutionality of the Act without reservations;<sup>23</sup> upholding the Act with strong reservations;<sup>24</sup> and striking down the Act as unconstitutional.<sup>25</sup> Recently, the only decision finding the Act unconstitutional was reversed in a two-to-one decision by the Fourth Circuit Court of Appeals.<sup>26</sup> Nevertheless, due to the great uncertainty generated by *Lopez*, commentators agree that the United States Supreme Court will rule on the constitutionality of the VAWA as soon as the opportunity arises.<sup>27</sup>

This Comment focuses on the challenges to the VAWA's civil rights provision and the ongoing debate about how the VAWA will fare in the wake of *Lopez*. Section II discusses the legislative history of the VAWA and gives an overview of the Act, focusing on the civil rights provision. The *Lopez* decision is reviewed in Section III. Section IV contains a survey of three cases brought under the civil rights provision of the VAWA involving constitutional challenges in which the courts employed varied reasoning with varied results.<sup>28</sup> A discussion of

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22. A small number of courts have cited *Lopez* to find federal statutes invalid. See, e.g., *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) (holding that receipt of natural gas from out-of-state source was insufficient to trigger federal jurisdiction for arson conviction); *Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996) (declaring the Freedom of Access to Clinic Entrances Act an invalid use of congressional power), *rev'd*, 126 F.3d 575 (4th Cir. 1997); *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995) (holding that the Child Support Recovery Act, which punished the failure to pay child support, was an unconstitutional exercise of congressional power), *rev'd*, 95 F.3d 787 (9th Cir. 1996), and *cert. denied*, 117 S. Ct. 1567 (1997).

23. See *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996). See *infra* text accompanying notes 84-104.

24. See *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997). See *infra* text accompanying notes 146-65.

25. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996). See *infra* text accompanying notes 105-44.

26. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997).

27. See, e.g., *Morning Edition: Supreme Court Session Preview* (NPR radio broadcast, Oct. 6, 1997), available in 1997 WL 12823426.

28. Other provisions of the VAWA have also faced constitutional challenges. See, e.g., *United States v. Bailey*, 112 F.3d 758 (4th Cir.), *cert. denied*, 118 S. Ct. 240 (1997). Bailey appealed his conviction under 18 U.S.C. § 2261(a)(2), Interstate Domestic Violence. Bailey was found guilty of assaulting his wife and subsequently putting her in the trunk of his car and driving in and out of state over a period of five days before finally taking her to a hospital. See *id.* at 761. The hospital recorded her injuries upon arrival as a three-inch laceration on her forehead, two black eyes, three wounds on her forehead that were still bleeding, a subconjunctive hemorrhage in her right eye, corneal abrasions, bruises on her throat, abrasions on her knees, pressure sores on her feet, ligature bruises on her wrists and ankles from being bound, severe anoxic brain injury due to lack of oxygen, and renal failure caused by profound dehydration resulting from not having adequate food or water for three to four days. See *id.* at 762.

Bailey's constitutional challenge to the statute relied upon *Lopez*. The court stated that, "[i]t [is] unnecessary to go in detail into the arguments applicable in *Lopez*, for we think previous decisions of the Supreme Court apply and that the statute in question is valid." *Id.* at 766. The precedent the

*Lopez*'s effects on Commerce Clause jurisprudence, and an analysis of the holdings and rationales of the decisions in the surveyed cases, follows in Section V. Section V also includes an analysis of the enactment of the VAWA under the Fourteenth Amendment as an alternative base of power upon which to uphold the constitutionality of the VAWA. This Comment concludes that the VAWA is constitutionally sound under Congress's broad Commerce Clause power and should survive *Lopez*. Additionally, this Comment calls for clarification of *Lopez* by the Supreme Court in order to lift the cloud of uncertainty that currently surrounds that decision.

## II. THE VAWA AND ITS CIVIL RIGHTS PROVISION

Congress enacted the VAWA to combat "the escalating problem of violence against women."<sup>29</sup> In considering the VAWA between 1990 and 1994, Congress held no fewer than five hearings on the topic of violence against women<sup>30</sup> and "amassed substantial documentation on how gender-based violence impacts interstate commerce and interferes with women's ability to enjoy equal protection of the laws."<sup>31</sup> Among Congress's rationales for enacting the VAWA was the recognition that

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court referred to was *Caminetti v. United States*, 242 U.S. 470 (1917), where the Supreme Court upheld the White Slave Traffic Act of 1910, and *Cleveland v. United States*, 329 U.S. 14 (1946), where the Court upheld the Mann Act. *See id.* Both of those cases involved the transportation of women across state lines for the purpose of being mistresses or plural wives. The *Bailey* court ended its somewhat cursory analysis, finding the statute constitutional because the cited precedent held that transportation of individuals across state lines was interstate commerce. *See id.* In a footnote, however, the court explicitly indicated that it was expressing no opinion as to Title III of the Act and was only concerned with the validity of the interstate domestic violence criminal provision of the Act. *See id.* at 765 n.6.

*See also* *United States v. Wright*, 965 F. Supp. 1307 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997). In *Wright*, the defendant moved to dismiss his indictment based upon the unconstitutionality of 18 U.S.C. § 2262(a)(1), Interstate Violation of a Protection Order. The district court found the statute unconstitutional, stating that merely "crossing a state line" was not "interstate commerce." *Id.* at 1308. The court further stated that, "while crossing a state line may be activity that is 'interstate,' the government has failed to present any statutory language, legislative history, or other authority to support its assertion that 'crossing a state line' constitutes interstate commerce subject to regulation by Congress." *Id.* The Eighth Circuit Court of Appeals reversed this decision, citing Supreme Court precedent and stating that crossing state lines is interstate commerce regardless of whether any commercial activity is involved. *See United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) (pointing out that the Supreme Court recently reaffirmed this principle in *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590 (1997)).

Finally, for the first reported decision involving a woman being charged under the VAWA, see *United States v. Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997). There, Rita Gluzman was convicted after her employee helped her kill her husband, dismember the body, and put the pieces in plastic bags. Because all of this conduct took place in New York and New Jersey, Gluzman was charged under the VAWA's Interstate Domestic Violence provision. She challenged her conviction on the basis that Congress exceeded its Commerce Clause authority in enacting the statute, but the court upheld the statute, adopting an analysis similar to that employed in *Bailey*. *See id.* at 89.

29. S. REP. NO. 103-138, at 37 (1993).

30. *See supra* note 10.

31. *Doe v. Doe*, 929 F. Supp. 608, 611 (D. Conn. 1996).

violence against women poses a very serious threat to this nation.<sup>32</sup> Congress concluded that only a national showing of intolerance for gender-based violence could stem this threat.<sup>33</sup> Therefore, Congress resolved that federal legislation constituted an appropriate and necessary step toward eliminating gender-based violence.<sup>34</sup>

The VAWA addresses a wide variety of subjects including, *inter alia*, gender bias in the courts,<sup>35</sup> use of federal monies to set up a nationwide hotline for domestic abuse victims,<sup>36</sup> and deportation relief for abused immigrants.<sup>37</sup> Because of the breadth of the subject matter regulated under the VAWA, its provisions are scattered throughout the United States Code. Additionally, the Act bestows a fiscal benefit upon states by allowing for substantial grants of federal money in future congressional budgets to fund battered women's shelters, law enforcement training regarding domestic calls, local hotlines, and other localized efforts to combat domestic violence.<sup>38</sup>

In enacting the VAWA, Congress relied on its broad power under the Commerce Clause.<sup>39</sup> Due to the use of this constitutional grant of authority, most of the congressional findings focused on the impact of gender-based violence on the national economy. Among the "economic effect" findings, Congress estimated that \$5 to \$10 billion was spent

32. See S. REP. NO. 103-138, at 37 (1993).

33. See *id.* at 42 (promising that the VAWA "is designed to remedy not only the violent effects of the problem, but the subtle prejudices that lurk behind it"); see also S. REP. NO. 102-197, at 35 (1991) (declaring that "[this] legislation is an important step . . . in the direction of developing what we need the most—a national consensus that this society will not tolerate this kind of violence").

34. See S. REP. NO. 103-138, at 42.

35. See Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40401-40422, 103 Stat. 1902, 1942-45 (codified as amended at 42 U.S.C. § 13993 (1994)).

36. See *id.* §§ 40201-40211, 108 Stat. at 1925-26. Many individuals working with those who have been affected by domestic violence prefer the term "survivor," but as Congress and the courts still generally use the term "victim" this Comment will also.

37. See *id.* §§ 40701-40702, 108 Stat. at 1953-55.

38. See James D. Polley, IV, *DOJ Budget Request For Fiscal Year 1998*, PROSECUTOR, March/April 1997, at 40. As Polley explains:

The VAWA would provide \$7 million to implement a research agenda, in conjunction with HHS and other agencies, to determine what works in prevention, intervention and control of violence against women. Other programs would include \$59 million . . . in discretionary grants to implement mandatory and pro-arrest policies and \$160 million . . . in formula grants to state and local governments to develop proactive, coordinated, and integrated law enforcement and prosecution strategies. . . . There would also be \$15 million . . . in grants to states and local governments in rural states to establish and expand cooperative efforts among prosecutor, police, and victim advocacy groups to respond to domestic violence and child abuse.

*Id.*; see also Violence Against Women Act §§ 40121, 40156, 40231, 40295, 103 Stat. 1902, 1910-16, 1922-23, 1932-34, 1940-41 (authorizing appropriations totaling \$241 million for fiscal year 1998 alone to be used to strengthen law enforcement and prosecution strategies and to encourage domestic violence arrest policies); see *id.* § 40507, 108 Stat. at 1949-50 (codified as amended at 42 U.S.C. § 14013 (1994)) (providing for studies of and reports on battered women's syndrome).

39. U.S. CONST. art. I, § 8, cl. 3; see also *Doe v. Doe*, 929 F. Supp. 603, 610 (D. Conn. 1996).



each year for medical care, criminal justice, and other costs related to domestic violence.<sup>40</sup>

One of the most controversial provisions of the VAWA is the civil rights provision, the operative subsection of which is entitled "Right to be free from crimes of violence."<sup>41</sup> By enacting the civil rights provision, Congress effectively announced that "violence motivated by gender is not merely an individual crime of personal injury, but a form of discrimination—an assault on [the] publicly shared ideal of equality."<sup>42</sup> The civil rights provision creates a positive statutory right for all persons within the United States to be free from crimes of violence motivated by gender.<sup>43</sup> Moreover, the Act provides a tool—a civil cause of action—which can be used to recover for a violation of this right.<sup>44</sup>

The VAWA civil rights provision is the first civil rights statute specifically addressing gender-motivated violence.<sup>45</sup> Congress found that existing laws prohibited gender-based crimes in the workplace but that, outside of the workplace, no civil rights protection existed for gender-motivated discriminatory acts of violence.<sup>46</sup> Congress also found numerous barriers to protection from these crimes, including: corroboration and utmost resistance rules in rape cases; spousal immunities for rape and battery; and jury instructions that questioned the victim's

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40. See S. REP. NO. 103-138, at 41 (1993) (citations omitted); see also *supra* text accompanying notes 1-5.

41. 42 U.S.C. § 13981(b) (1994). Part C of the VAWA, entitled "Civil Rights for Women," is referred to as the "civil rights provision" throughout this Comment.

42. Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505, 505 (1995).

43. As stated in the VAWA, the purpose of the civil rights provision is as follows: 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.

42 U.S.C. § 13981(a) (1994). In order to succeed in an action under the VAWA's civil rights provision, a plaintiff must prove by a preponderance of the evidence that she was a victim of a crime of violence and that the perpetrator of that crime was motivated by the victim's gender. See *id.* § 13981(e)(1). Because this is a civil rights provision, proof of intent or "animus" can be achieved by evidence similar to that used in other civil rights cases, such as derogatory epithets, a pattern of similar attacks, excessive force, and lack of other motivation. See Goldscheid & Kraham, *supra* note 42, at 509. A "crime of violence" is defined in the statute as an act that would constitute a felony under state or federal law. See 42 U.S.C. § 13981(d)(2)(a) (1994). For commentary suggesting that this reliance on state law may perpetuate the worst aspects of federalism by creating a federal civil rights remedy dependent upon the very state laws whose inadequacies are part of the justification for the federal remedy itself, see David Frazee, *An Imperfect Remedy For Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. OF GENDER & L. 163 (1993).

44. See 42 U.S.C. § 13981(c) (creating a cause of action for a victim whose § 13581(a) rights have been violated).

45. See Frazee, *supra* note 43, at 164-65.

46. See S. REP. NO. 103-138, at 29 (1993).

credibility.<sup>47</sup> Furthermore, Congress determined that state and federal laws were inadequate to protect against the bias element of gender-based crimes.<sup>48</sup>

Because of these barriers, biases, and inadequacies, Congress enacted the VAWA civil rights remedy to fill the gap in civil rights law and to provide victims with another avenue for legal redress.<sup>49</sup> By invoking the rights conferred by the civil rights provision of the VAWA, the victim of a violent crime motivated by gender may bring a civil lawsuit in federal or state court, seeking compensatory damages, punitive damages, injunctive relief, and attorney's fees.<sup>50</sup> The Senate focused on the victim's power and control in the process, stating that the VAWA civil rights remedy provides victims with a "legal tool" that the victim alone can deploy without interference by a state prosecutor.<sup>51</sup> The Senate Judiciary Committee praised another feature of the remedy that it viewed as highly favorable to the victim—a defendant may not invoke his or her Fifth Amendment privilege in a civil cause of action and, therefore, the victim may force the defendant to testify.<sup>52</sup>

The civil rights provision encountered early opposition. In 1991, the Judicial Conference of the United States officially opposed the provision because claims under it would "embroil the federal courts in domestic relations disputes."<sup>53</sup> The opposition of the Judicial Conference was subsequently withdrawn, though not recanted.<sup>54</sup> Nevertheless, the obstacles facing the VAWA did not die. Instead, the statute now faces a serious challenge birthed by the *Lopez* decision.

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47. See S. REP. NO. 102-197, at 44-45 (1991).

48. See H.R. CONF. REP. NO. 103-711, at 385 (1994).

49. See S. REP. NO. 101-545, at 42 (1990).

50. See Goldscheid & Kraham, *supra* note 42, at 505; see also 42 U.S.C. § 13981 (1994).

51. See S. REP. NO. 101-545, at 42 (1990).

52. See *id.*

53. *Report of the Judicial Conference Ad Hoc Comm. on Gender-Based Violence* 1 (Sept. 1991). The Report stated that the VAWA would "flood [federal courts] with cases that have been traditionally within the province of state courts." *Id.* at 7. In his year-end report, Chief Justice Rehnquist stated that federal courts should be "reserved for issues where important national interests predominate." William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 *THE THIRD BRANCH* 1, 2 (1992). He then endorsed the Judicial Conference's opposition to the VAWA and reiterated that it "could involve the federal courts in a whole host of domestic relations disputes." *Id.* at 3.

54. The Judicial Conference of the United States subsequently withdrew its opposition to the civil rights provisions. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Perogative and Privacy*, 105 *YALE L.J.* 2117, 2207 n.297 (1996). For commentary discussing opposition by the judiciary, see Rorie Sherman, *Fears Expressed On Proposed Bill To Aid Women*, *NAT'L L.J.*, June 3, 1991, at 3, and Mary Wisniewski, *Judges Oppose Federal Spouse Abuse Bill*, *CHI. DAILY L. BULL.*, Oct. 4, 1991, at 2. For commentary discussing support by the judiciary, see *Hearings on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 63 (1993), wherein the Honorable Judith Billings, Judge of the Utah Court of Appeals and President of the National Association of Women Judges stated that, "[t]he National Association of Women Judges believes that the creation of a federal civil rights remedy will provide needed congressional recognition that gender-based violence is a national problem." *Id.*

III. *UNITED STATES V. LOPEZ*

In *United States v. Lopez*,<sup>55</sup> decided a mere seven months after the enactment of the VAWA, the United States Supreme Court limited Congress's commerce power for the first time in over half a century.<sup>56</sup> The case involved the GFSZA, which criminalized "possess[ion of] a firearm at a place that the individual knows . . . is a school zone."<sup>57</sup> A high school student was charged under the statute, and moved to dismiss on grounds that the statute was "unconstitutional as it is beyond the power of Congress to legislate control over our public schools."<sup>58</sup> The district court denied the motion, finding the statute constitutional under Congress's "power to regulate activities in and affecting commerce, and concluding that the 'business' of elementary, middle and high schools . . . affects interstate commerce."<sup>59</sup> The Court of Appeals for the Fifth Circuit agreed with respondent's argument that Congress had exceeded its power under the Commerce Clause.<sup>60</sup> The Supreme Court affirmed the appellate court's decision. The Court held that the Act exceeded Congress's Commerce Clause powers because the regulated activity did not have a sufficient nexus with interstate commerce.<sup>61</sup>

In its opinion, the Supreme Court described the three broad categories of activity that Congress may regulate under its commerce power: channels of interstate commerce; instrumentalities of interstate commerce (or persons or things in interstate commerce); and activity "substantially affecting" interstate commerce.<sup>62</sup> The Court quickly excluded the first two categories as inapplicable and stated that the Act could only be sustained as a regulation of activity "substantially affecting" interstate commerce.<sup>63</sup> In determining whether a regulated activity substantially affects interstate commerce, the Court acknowledged that it did not *require* congressional findings, but suggested that such findings would be helpful when the regulated activity's nexus to interstate commerce was not "visible to the naked eye."<sup>64</sup> Further, the Court noted that it would consider legislative findings as part of its "independent evaluation of constitutionality under

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55. 514 U.S. 549 (1995).

56. See generally Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 811 (1996) (discussing how *Lopez* avoided overruling prior cases).

57. 18 U.S.C. § 922(q)(2)(A) (1994); see *United States v. Lopez*, 514 U.S. at 549.

58. *United States v. Lopez*, 514 U.S. at 551.

59. *Id.* at 551-52.

60. See *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993).

61. See *id.* at 567.

62. See *id.* at 558-59. The Court clarified that the third category required that an activity "substantially affect" interstate commerce rather than merely "affect" it. See *id.*

63. See *id.* at 559.

64. *Id.* at 563.

the Commerce Clause."<sup>65</sup> The Court *could not* consider the GFSZA's legislative history, however, because Congress did not make any pre-enactment findings regarding the effects of gun possession in a school zone on interstate commerce.<sup>66</sup>

To explain the requisite nexus between the regulated activity and interstate commerce, the Government offered the broad and speculative argument that gun possession near schools may result in violent crime which would, in turn, affect the national economy in two ways: first, substantial costs of violent crime would be spread throughout the population by insurance; and, second, violent crime would discourage travel to areas "perceived to be unsafe."<sup>67</sup> The Government further argued that the presence of guns in schools handicaps the educational process by threatening the learning environment.<sup>68</sup> As a result, it argued, the nation will have a less educated and therefore "less productive citizenry" which will substantially affect interstate commerce.<sup>69</sup>

The Court responded that, under the Government's "cost of crime" and "national productivity" theories, "it is difficult to perceive any limitation on federal powers . . . ."<sup>70</sup> The Court further stated that the premise that guns in schools diminish education, and education affects the economy, and the economy is inseparable from interstate commerce, was too attenuated and required the Court to "pile inference upon inference" to find an adequate connection to interstate commerce.<sup>71</sup>

The Court proceeded to emphasize the non-commercial nature of the statute, concluding that the GFSZA did not regulate a commercial enterprise or commercial actors and that it was not an essential part of a larger regulation of economic activity.<sup>72</sup> In its analysis, the Court distinguished the GFSZA from a number of other statutes regulating intrastate activities.<sup>73</sup> The Court stated that the GFSZA was essentially

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65. *Id.* at 562.

66. *See id.* at 562-63. The Government conceded that "[n]either the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id.*

67. *Id.* at 563-64.

68. *See id.* at 564.

69. *Id.*

70. *Id.* at 564.

71. *Id.* at 567.

72. *See id.* at 561. The Court noted that the regulation upheld in *Wickard v. Filburn*, 317 U.S. 111 (1942), involved economic activity in a way that the possession of a gun in a school zone does not. *See id.* at 560.

73. *See id.* at 558. The Court confirmed that mining coal, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); extorting a loan, *Perez v. United States*, 402 U.S. 146 (1971); running a restaurant or hotel, *Katzenbach v. McClung*, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); and growing wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942)—though each was an intrastate activity—were commercial activities validly regulated by Congress. *See id.* at 559-60; *see also* *United States v. Lopez*, 514 U.S. at 573-75 (Kennedy, J., concurring) ("These and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today.").

a criminal statute that "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."<sup>74</sup> Moreover, the Court noted that the GFSZA contained no jurisdictional element that would ensure that the firearm in question affected or traveled through interstate commerce before implicating the statute.<sup>75</sup>

The Court acknowledged that, by giving great deference to congressional action, some of its prior cases had "taken long steps down [the] road" to converting congressional authority to a "general police power" of the sort expressly reserved to the states.<sup>76</sup> That said, the Court did not overrule or even malign any previous Commerce Clause decisions. In striking down the GFSZA, the Court intimated that it would not sanction *additional expansion* of congressional authority under the Commerce Clause.<sup>77</sup>

It is significant that *Lopez* was decided by a narrow (five-to-four) margin.<sup>78</sup> Justice Souter's dissent called for deference to Congress's judgment that the regulation addressed a subject that substantially affected interstate commerce.<sup>79</sup> Supporting his position, Justice Souter quoted *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,<sup>80</sup> which states that "'if there is any rational basis for such a finding,'" the statute must be upheld.<sup>81</sup> He then stated that if Congress found that the regulated activity substantially affects interstate commerce, the only remaining issue for judicial determination is whether the regulatory means are reasonably related to the constitutionally permissible end.<sup>82</sup>

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74. *United States v. Lopez*, 514 U.S. at 561.

75. *See id.* The Court distinguished a prior case that upheld federal regulation of gun possession because it required a showing that the gun had an explicit connection to interstate commerce, whereas the GFSZA contained no such requirement. *See id.* at 561-62 (discussing *United States v. Bass*, 404 U.S. 336 (1971)); *cf. Scarborough v. United States*, 431 U.S. 563, 575 (1977) (holding that a gun shown to travel through interstate commerce provided sufficient nexus to interstate commerce).

76. *United States v. Lopez*, 514 U.S. at 567.

77. *See id.* However, Justice Thomas's concurrence called for a tempering of Commerce Clause jurisprudence that has "drifted far from the original understanding of the Commerce Clause." *Id.* at 584 (Thomas, J., concurring).

78. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *See id.* at 551. Justice Kennedy filed a concurring opinion, in which Justice O'Connor joined. *See id.* at 568 (Kennedy, J., concurring). Justice Thomas also filed a concurring opinion. *See id.* at 584 (Thomas, J., concurring). Justices Stevens, *see id.* at 602 (Stevens, J., dissenting), and Souter, *see id.* at 603 (Souter, J., dissenting), filed dissenting opinions. And finally, Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined. *See id.* at 614 (Breyer, J., dissenting).

79. *See id.* at 603 (Souter, J., dissenting).

80. 452 U.S. 264 (1981).

81. *United States v. Lopez*, 514 U.S. at 603 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 276) (Souter, J., dissenting).

82. *See id.*

IV. CASES INVOLVING *LOPEZ*-BASED CHALLENGES TO THE VAWA

To date there are scarcely a half-dozen reported cases involving claims under the VAWA's civil rights provision.<sup>83</sup> The following three cases are among the first. An analysis of the defendants' *Lopez*-based Commerce Clause challenges and the courts' varying rulings and rationales illuminates the debate over the constitutionality of the VAWA and the meaning of *Lopez*.

A. *Doe v. Doe*

*Doe v. Doe*<sup>84</sup> was the first reported case addressing the constitutionality of the VAWA's civil rights provision. The plaintiff, filing under the pseudonym Jane Doe, sought damages under the VAWA's civil rights remedy from her husband for alleged gender-based violence.<sup>85</sup> This violence allegedly occurred over the course of seventeen years in which the defendant threw the plaintiff to the floor, kicked her, threw sharp objects at her, threatened her life, and destroyed her personal property.<sup>86</sup> The plaintiff further alleged that her husband forced her to be a "slave" to him, even requiring her to lay out his clothes for his dates with his girlfriends and mistresses.<sup>87</sup>

The defendant's motion to dismiss challenged the constitutionality of the VAWA as beyond the scope of Congress's Commerce Clause authority.<sup>88</sup> The defendant relied on *Lopez*, claiming that "the VAWA creates a 'plenary federal police power,' outside of the Constitution's

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83. See, e.g., *Doe v. Hartz*, 970 F. Supp. 1375, 1434-35 (N.D. Iowa 1997) (upholding the constitutionality of the VAWA, but ordering an interlocutory appeal due to the "controlling questions of law as to which there is substantial ground for difference of opinion," because, were the VAWA to be found unconstitutional, the federal district court would have no jurisdiction); *Anisimov v. Lake*, 982 F. Supp. 531, 539-41 (N.D. Ill. 1997) (upholding the VAWA, echoing the Commerce Clause analysis used by prior courts, and certifying the entire matter for interlocutory appeal). For newspaper articles that have reported other claims brought under the VAWA's civil rights provision, see Daniel Cude, *3 Ex-Employees Sue Company for Sexual Harassment*, SPARTANBURG HERALD-J., Oct. 9, 1997, at B8, available in 1997 WL 9544426 (indicating that three women have brought suit under the VAWA asking for actual and punitive damages, based on allegations that their former manager sexually harassed and assaulted them); Ben L. Kaufman, *Ex-Patient's Suit Claims Rights Violated*, CINCINNATI ENQ., Oct. 16, 1997, at B12, available in 1997 WL 5472907 (reporting that a woman claimed that her orthopedist had violated her civil rights under the VAWA through uninvited sexual advances).

84. 929 F. Supp. 608 (D. Conn. 1996).

85. See *id.* at 610. Amici curiae involved in the case were: NOW Legal Defense and Education Fund, National Organization for Women Foundation, The Connecticut Women's Education and Legal Fund, Inc., Connecticut Chapter of National Organization of Women, Connecticut Coalition Against Domestic Violence, Legal Aid Society of Hartford County, Inc., National Coalition Against Domestic Violence, and Pennsylvania Coalition Against Domestic Violence. See *id.* n.2.

86. See *id.*

87. See *id.*

88. See *id.*

rubric which 'creates a Federal Government of enumerated powers.'"<sup>89</sup> The United States District Court for the District of Connecticut upheld the VAWA, finding that "[a] rational basis exists for concluding that gender-based violence, which the VAWA's Civil Rights Remedy regulates, is a national problem" which substantially affects interstate commerce and thus warrants regulation under the Commerce Clause.<sup>90</sup> In its decision, the court relied on congressional findings to satisfy the rational basis requirement.<sup>91</sup>

The *Doe* court enumerated the three broad categories of activity that Congress may regulate under the Commerce Clause, just as the *Lopez* court had done, and then limited its analysis to the third category—activities that substantially affect interstate commerce.<sup>92</sup> The court relied only on the third category "in light of the Supreme Court's attention to this prong in *Lopez*."<sup>93</sup>

The court proceeded to describe the process involved in reviewing the constitutionality of a statute under the "substantial effects" category of permissible Commerce Clause regulation.<sup>94</sup> According to the court, the first inquiry requires a determination of whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce.<sup>95</sup> The second step of the review process involves determining "whether the means chosen by Congress 'are reasonably adapted to the end permitted by the Constitution.'"<sup>96</sup>

After finding that a rational basis existed for Congress to find that gender-based violence substantially affects interstate commerce, the court proceeded to determine whether the means chosen by Congress were reasonably adapted to its intended end.<sup>97</sup> The court disagreed with the defendant's argument that "the VAWA encroaches on traditional police powers of the state and impermissibly 'federalizes' criminal, family law, and state tort law."<sup>98</sup> Responding to this argument, the court pointed out that the civil rights provision does not infringe upon traditional areas of state law because it does not involve any arrest or prosecution of the alleged perpetrator but instead complements state tort law.<sup>99</sup> The court further found that the VAWA, modeled after other traditional civil rights legislation, "is reasonably adapted to an end permitted by the constitution [sic]."<sup>100</sup>

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89. *Id.* at 612 (quoting *United States v. Lopez*, 514 U.S. 549, 552 (1995)).

90. *Id.* at 610.

91. *See id.*

92. *See id.* at 612.

93. *Id.*

94. *See id.*

95. *See id.*

96. *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)).

97. *See id.* at 616.

98. *Id.* at 615-16.

99. *See id.* at 616.

100. *Id.* at 617.

The court also distinguished the VAWA from the GFSZA, stating that "the Congressional findings and reports qualitatively and quantitatively demonstrate the substantial effect on interstate commerce of gender-based violence, in marked distinction to the [GFSZA] . . . which lacked such analysis, [and involved] only theoretical impact arguments."<sup>101</sup> The court repeatedly referred to the legislative findings involved in passing the VAWA, while acknowledging the Supreme Court's statement in *Lopez* that it did not require such findings but would consider them as helpful.<sup>102</sup>

The *Doe* court expressly stated that it would not reach the constitutionality of the statute's enactment under the Fourteenth Amendment because it held that it was a permissible exercise of Congress's commerce power.<sup>103</sup> Nevertheless, in its discussion, the court focused on the inadequacy of traditional state law sources of protection from and opportunity for redress for serious crimes against women.<sup>104</sup>

### B. *Brzonkala v. Virginia Polytechnic & State University*

Not long after the *Doe* case, the debate over the constitutionality of the VAWA ignited with a ruling that the Act was unconstitutional. In *Brzonkala v. Virginia Polytechnic & State University*,<sup>105</sup> a university student brought suit against two fellow student athletes who allegedly raped her.<sup>106</sup> The plaintiff, Christy Brzonkala, went into a dormitory room of some fellow student athletes with a friend.<sup>107</sup> After her friend left the room, the two occupants of the room, men who Brzonkala would later learn were football players, then allegedly took turns raping her.<sup>108</sup>

The court first considered whether Brzonkala's complaint sufficiently stated a claim for relief under the VAWA's civil rights provision.<sup>109</sup> The court stated that the crucial element involved a showing that the rape was "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gen-

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101. *Id.* at 613.

102. *See id.* at 612.

103. *See id.*

104. *See id.* n.5. The court recounted Senate findings on that issue as well as studies concluding that "crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men." *Id.* at 616.

105. 935 F. Supp. 779 (1996). A fairly recent constitutional ruling by Judge Kiser, the presiding judge in *Brzonkala*, held that Virginia Military Institute could remain all-male without violating the Equal Protection Clause of the Fourteenth Amendment. *United States v. Virginia*, 766 F. Supp. 1407, 1415 (W.D. Va. 1991). Interestingly, Judge Kiser's decision was reversed by the Supreme Court in *United States v. Virginia*, 518 U.S. 515 (1996).

106. *See Brzonkala v. Virginia Polytechnic & State Univ.* 935 F. Supp. at 781-82.

107. *See id.*

108. *See id.* at 782.

109. *See id.* at 783-85 (referring to FED. R. CIV. P. 12(b)(6)).



der.”<sup>110</sup> It concluded that the allegations, if true, were sufficient to fulfill the requirements for relief under the statute by a showing of gender animus.<sup>111</sup>

After concluding that Brzonkala had stated a claim, the court proceeded to consider the constitutionality of the statute.<sup>112</sup> The court’s analysis began with a recap of Congress’s Commerce Clause power and a discussion of *Lopez*.<sup>113</sup> Specifically, it considered whether the VAWA was a permissible use of Congress’s Commerce Clause power.<sup>114</sup> In addressing this issue, it considered the *Lopez* Court’s concern 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.”<sup>115</sup>

The court stated that it had “heeded that warning” and had undertaken to determine whether Congress had a rational basis for concluding that the “regulated activity sufficiently affected interstate commerce.”<sup>116</sup> It further noted that Congress may not regulate activities with only a relatively trivial impact on commerce.<sup>117</sup> This focus on federalism, paired with the preceding quote, gave an early clue that the court’s posture on the issue was not favorable. Specifically, it appeared that the court did not see the nexus between the regulated conduct and interstate commerce and that it believed Congress had overstepped its bounds under its Commerce Clause power.

Resembling the judicial analyses in *Lopez* and *Doe*, the court immediately dismissed the first and second categories which Congress

110. *Id.* at 784 (quoting 42 U.S.C. § 13981(d)(1) (1994)).

111. *See id.* at 784-85. The court found sufficient evidence of gender animus based upon Brzonkala’s allegations 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.”

*Id.* at 784. The court declined to decide whether an allegation of rape alone would be sufficient to state a claim, stating that “[a]ll 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.” *Id.*

112. *See id.* at 785-801.

113. *See id.* at 785-87.

114. *See id.*

115. *Id.* at 786 (quoting *United States v. Lopez*, 514 U.S. 519, 557 (1995)) (internal citations omitted).

116. *Id.*

117. *See id.*

may regulate under the Commerce Clause.<sup>118</sup> Therefore, if the court were to uphold the VAWA, it would have to be a permissible exercise of power under the third category: "[I]t must regulate an activity that has a substantial effect on interstate commerce."<sup>119</sup> In its analysis under the third category, the court delved further into the Supreme Court's reasoning in *Lopez*, parsing the analysis and focusing on the *Lopez* Court's determination that the activity regulated was non-economic.<sup>120</sup>

The court noted that the *Lopez* Court differentiated between situations where regulated intrastate activity is economic in nature and situations where the intrastate activity is non-economic in nature.<sup>121</sup> The court then concluded that under such an analysis, cases such as *Wickard v. Filburn*,<sup>122</sup> "where regulated intrastate activity is *economic* in nature, do not control cases where regulated intrastate activity is *not* economic."<sup>123</sup> The court criticized the *Doe* court's use of *Wickard* in upholding the VAWA, stating that its analysis was contrary to *Lopez*, which had distinguished the *Wickard* case.<sup>124</sup> The court further explained that after *Lopez*, reliance on *Wickard* to analyze the commerce power in a case involving a non-economic intrastate activity is "not tenable."<sup>125</sup> In addition to *Wickard*, the court distinguished all other cases upon which the plaintiff relied heavily as cases involving economic activity.<sup>126</sup>

In discussing Congress's findings, the court found that it was reasonable to infer from such findings that violence against women has a major effect on the national economy.<sup>127</sup> Nevertheless, the court was

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118. *See id.* The court found that the 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." Also, VAWA is not a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Admittedly women often travel between states, as do their abusers and assailants, but certainly more is required to qualify for the commerce power.

*Id.* (citations omitted).

119. *Id.*

120. *See id.* at 786-87.

121. *See id.*

122. 317 U.S. 111 (1942).

123. *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. at 787 (emphasis added).

124. *See id.* at 791.

125. *See id.*

126. *See id.* at 791-92. The court noted the following cases involving federal statutes which regulated intrastate economic activity: *Hodel v. Virginia Surface Mining & Reclamation*, 452 U.S. 264 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (extortionate credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants); and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (inns and hotels); *see also Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. at 791-92 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

Latching onto the Supreme Court's "economic v. non-economic" analysis in *Lopez*, the court proceeded to note the similarities and differences between the VAWA and the GFSZA and found no meaningful distinction between them. *See id.* at 792-93.

127. *See id.* at 792.

uncomfortable with Congress's focus on the effect on the "national economy." The court eschewed the Government's reasoning, stating:

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.<sup>128</sup>

The court supported its position by recounting a "horrible hypothetical" furnished by the defendant about the cost of insomnia on interstate commerce.<sup>129</sup> The court extended the reasoning of the hypothetical to show that matters typically regulated by the states, such as family law, affect the national economy substantially and thus have some effect on interstate commerce.<sup>130</sup> The court indicated that, under such an analysis, these issues too would be within Congress's power to regulate.<sup>131</sup> The court concluded that "if the VAWA is a permissible 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."<sup>132</sup> The court opined that "to extend Congress's power to these issues would unreasonably tip the balance away from the states."<sup>133</sup>

The court was unimpressed by the limiting language that Congress injected into the VAWA,<sup>134</sup> which states that the 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."<sup>135</sup> The court held that the regulated conduct was non-economic and that "[a]

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128. *Id.* at 792-93.

129. *See id.* at 793. The Court described the defendant's hypothetical as follows:

[I]nsomnia costs the United States \$15 billion a year. This is as much as the yearly cost of domestic abuse. Other sources indicate that the cost of insomnia is much higher. 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 that has traveled across state lines.

*Id.* (citations omitted). Thus, Congress could conceivably regulate almost any activity relating only remotely to interstate commerce.

130. *See id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. *See id.* at 783.

135. 42 U.S.C. § 13981(e)(4) (1994).

reasonable adherence to *Lopez* reveal[ed] that the VAWA is not a proper use of the commerce power."<sup>136</sup>

Unlike the *Doe* court, the *Brzonkala* court placed little emphasis on Congress's vast findings in its analysis, noting that congressional findings were not "necessary" under *Lopez*, and concluding that the absence of such findings in *Lopez* was incidental to that court's decision.<sup>137</sup> Thus, the court held that, regardless of the extensive congressional findings related to the VAWA, it was up to the court to determine, based on the circumstances and common sense, whether Congress had a rational basis for concluding that gender-based violence substantially affects interstate commerce.<sup>138</sup>

Because the court did not uphold the VAWA under the Commerce Clause, which would have rendered any further analysis unnecessary, it was necessary for the court to consider the viability of the statute under the Fourteenth Amendment.<sup>139</sup> The court found that Congress had exceeded its power under the Fourteenth Amendment as well, stating that some state involvement was needed in order to invoke that power.<sup>140</sup> Based on legislative history, the court acknowledged that the framers intended the Amendment to apply to "private encroachment on civil rights," but a nexus to state action was required for the Fourteenth Amendment to reach private conduct "even though [that state action] may be tangential."<sup>141</sup>

In December of 1997, the Fourth Circuit Court of Appeals, in a two-to-one decision, reversed the district court's decision and reinstated *Brzonkala*'s lawsuit.<sup>142</sup> In upholding the VAWA as constitutional, the majority focused a great deal on the substantial legislative history and employed *Hodel*'s rational basis test.<sup>143</sup> In a scathing dissent, Judge Luttig criticized the majority's "manifest misunderstanding" of *Lopez* and praised the district court's careful and thorough analysis of that decision and its impact on Commerce Clause jurisprudence.<sup>144</sup> The varying reasoning and analysis employed in the majority opinion and the dissent highlight the disparate interpretations of *Lopez* by the courts. The Fourth Circuit's *Brzonkala* decision will be further considered in Section V of this Comment.

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136. *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. at 793.

137. *See id.* at 789.

138. *See id.* at 789-90.

139. *See id.* at 793-96; *see also supra* note 13 and accompanying text.

140. *See id.* The Supreme Court noted in the *Civil Rights Cases*: "Individual invasion of individual rights is not the subject-matter of the [Fourteenth A]mendment." *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

141. *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. at 794; *see generally* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329-30 (1952).

142. *See Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997).

143. *See id.* at 964-66.

144. *See id.* at 974 (Luttig, J., dissenting).

### C. *Seaton v. Seaton*

With the *Doe* and *Brzonkala* rulings, the birth of the debate over the constitutionality of the VAWA, as manifested in the courts, was recognized.<sup>145</sup> The next ruling on the constitutionality of the civil rights provision of the VAWA added yet another level to the debate by upholding the statute with strong policy reservations.

In *Seaton v. Seaton*,<sup>146</sup> Laurel Knuckles Seaton brought an action against her husband during an acrimonious and high-profile divorce<sup>147</sup> to recover for violation of her civil rights under the VAWA and for various state tort law claims.<sup>148</sup> Mrs. Seaton filed for divorce from her husband after years of "controlling, deceitful and abusive behavior, of which the plaintiff was a victim."<sup>149</sup> The plaintiff's complaint sought "injunctive relief, incidental and compensatory damages, exemplary and punitive damages, attorney fees and costs, and other equitable relief."<sup>150</sup>

Mr. Seaton moved for dismissal or summary judgment, arguing that the VAWA was unconstitutional.<sup>151</sup> His motion to dismiss was denied as to the VAWA claim and granted as to state claims.<sup>152</sup> The court upheld the VAWA as constitutional, focusing on Congress's significant legislative findings,<sup>153</sup> but noted its disapproval of the sweeping nature

145. See David E. Rovella, *He Rules, She Rules On Violence Law*, NAT'L L.J., Aug. 12, 1996, at A8 ("Maybe it's just a coincidence, but the first court rulings on the constitutionality of the Violence Against Women Act have split along gender lines. A female federal judge upheld the law, and a male judge ruled it unconstitutional.").

146. 971 F. Supp. 1188 (E.D. Tenn. 1997).

147. The facts of this case have been sensationally publicized. See *Judge Upholds VAWA*, NAT'L L.J., July 21, 1997, at A8, stating that:

With reservations, a federal judge . . . affirmed the constitutionality of [the VAWA] . . . In *Seaton v. Seaton* . . . Knoxville lawyer Laurel Seaton claims she was beaten, abused, and belittled during a three-year marriage to businessman Kenneth Seaton. He owns KMS Enterprises, with holdings including Family Inns of America in nine states. While their divorce is pending in state court, Mrs. Seaton is suing in federal court for damages of \$40 million to \$87 million . . . She claimed her husband duped her into signing a prenuptial agreement. Mr. Seaton claimed his wife was using the federal law "to tip the equitable scales of distribution in her favor" over marital assets.

*Id.*

148. See *Seaton v. Seaton*, 971 F. Supp. at 1189. The state law claims included assault and battery (Count II), intentional infliction of emotional distress (Count III), false imprisonment (Count IV), breach of fiduciary duty (Count V), fraud and conversion (Count VI), and misrepresentation (Count VII). See *id.*

149. *Id.* Plaintiff was spurred to action by an alleged final altercation in which "defendant severely threatened and assaulted her." *Id.*

150. *Id.*

151. See *id.* at 1189-90.

152. See *id.* at 1189.

153. See *id.* at 1190 n.1 ("The court must note for the record, however, the overwhelming evidence of gender-based violence adduced by the congressional committee that analyzed this problem. This evidence clearly established a compelling legislative interest in addressing such a widespread problem.").

of the statute and indicated concern about family issues being brought into federal courts, stating:

While there is no doubt that violence against women is a serious matter in our society, this particular remedy created by Congress, because of its extreme overbreadth, opens the doors of the federal courts to parties seeking leverage in settlements rather than true justice. The framers of the Constitution did not intend for the federal courts to play host to domestic disputes and invade the well-established authority of the sovereign states.<sup>154</sup>

This analysis echoed the *Doe* court's emphasis on the vast legislative findings supporting the VAWA, and the lack thereof supporting the GFSZA. The court indicated that it viewed the legislative findings as an important element of the analysis of the VAWA's constitutionality, stating that the VAWA, "unlike the Act in *Lopez*, contains extensive congressional findings into the impact of violence on interstate commerce."<sup>155</sup> The court concluded that, "although 'to the naked eye' there may be no clear rationale for Congress to conclude that violence against women substantially affects interstate commerce, these congressional findings may offer a basis to evaluate Congress's judgment."<sup>156</sup> Finding that there may indeed be a substantial effect regardless of the statute's reliance on activity that is not visibly commercial, the court noted that the question remained "whether the legislative findings provide[d] a rational basis for concluding that gender-based violence has a substantial effect on interstate commerce."<sup>157</sup>

Citing *Doe*, the court held that because *Lopez* did not overturn or limit the "rational basis" test under *Hodel*, that test was still to be employed.<sup>158</sup> From that declaration, the court determined that the numerous hearings and substantial documentation amassed by Congress evinced a rational basis for finding that gender-based violence sufficiently affects interstate commerce and that, therefore, the test was satisfied.<sup>159</sup> The court held that, "even though VAWA . . . is not clearly commercial on the surface, there was a clear rational basis for Congress's actions, making the Act valid under the Commerce Clause."<sup>160</sup>

The court, however, again expressed reservations, stating that it was "reluctantly inclined to agree with the *Doe* court[']s finding] that Congress had a rational basis for determining that violence against

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154. *Id.* at 1190-91.

155. *Id.* at 1192.

156. *Id.*

157. *Id.* at 1191-93.

158. *See id.* at 1193.

159. *See id.*

160. *Id.*

women sufficiently affects interstate commerce."<sup>161</sup> The court also showed tempered concern regarding the possibility that Congress would now hold hearings and make findings essentially to dodge judicial scrutiny under the rational basis test:

While it is true that affording undue or excessive weight to the existence of legislative findings may create an opportunity for Congress to conduct hearings and compile information merely to exhibit some rational basis for a statute, this is an unlikely scenario, so long as the courts exercise reasonableness in their analysis of legislative findings. Here, it is unlikely Congress would spend four years determining the effects of gender-based violence on interstate commerce for the sole purpose of overcoming the rationality test and the Supreme Court's decision in *Lopez*, especially since *Lopez* was decided after the congressional hearings and findings began being made.<sup>162</sup>

Mirroring the *Doe* court, the *Seaton* court found the statute constitutional under the Commerce Clause and, therefore, did not address whether the statute could be sustained under the Fourteenth Amendment. Nevertheless, as the *Doe* court had done, the court engaged in a cursory equal protection discussion, noting that Congress's findings grew out of the recognition by many states that their judicial systems inadequately address "injurious gender-based conduct."<sup>163</sup> The court concluded that because "the states did not offer adequate protection from gender-based crimes, Congress was hardly unreasonable in creating a civil rights remedy to correct such deficiencies."<sup>164</sup> The court went further, observing that in the past the same course was followed in efforts to correct other pressing social ills, such as racial discrimination.<sup>165</sup>

## V. DISCUSSION

As the Supreme Court predicted,<sup>166</sup> *Lopez* has resulted in uncertainty and confusion. The disparate treatment and interpretation of *Lopez* by the *Doe*, *Brzonkala*, and *Seaton* courts illustrate this uncertainty. In light of this confusion, it seems likely that *Lopez* will be further dissected, distorted, and contorted, resulting in more contradictory court decisions before the cloud of confusion is lifted. However, a close analysis of Commerce Clause jurisprudence and the Supreme Court's pronouncements on the commerce power in *Lopez* can serve to diminish this confusion.

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161. *Id.*

162. *Id.* at 1194.

163. *Id.*; see also S. REP. NO. 138, at 49 (1993).

164. *Seaton v. Seaton*, 971 F. Supp. at 1194.

165. See *id.*; see also *Katzenbach v. McClung*, 379 U.S. 294 (1964).

166. See *United States v. Lopez*, 514 U.S. 549, 566 (1995).

### A. Lopez, Judicial Review, and the Commerce Clause

The enumerated power upon which Congress primarily relies to enact legislation is the Commerce Clause, which allows Congress to regulate commerce among the states.<sup>167</sup> The Commerce Clause gives Congress authority to regulate channels of interstate commerce, instrumentalities of interstate commerce (or persons or things in interstate commerce), or activities that substantially affect interstate commerce.<sup>168</sup> In 1824, Chief Justice Marshall defined Congress's commerce power in *Gibbons v. Ogden*<sup>169</sup> as a plenary power that Congress may exercise "to its utmost extent."<sup>170</sup> In the following century, that power was often viewed expansively but, at times, was restricted by the courts.<sup>171</sup> Between 1937 and 1994, the Supreme Court found every congressional enactment under the Commerce Clause sufficiently connected to interstate commerce to justify federal regulation.<sup>172</sup>

Those reading *Lopez* broadly can be viewed as reacting to the "ever expanding" uses to which Congress has put its commerce power over the past sixty years. One argument for a broad reading of *Lopez* is that the limits on Congress's commerce power have essentially disappeared and that this power has grown into a masked federal police power. Individuals advocating a broad reading of *Lopez* see the decision not as simply marking the outer limits of Congress's commerce power but as

167. U.S. CONST. art. I, § 8, cl. 3.

168. See *United States v. Lopez*, 514 U.S. at 558 (identifying three categories that Congress may regulate under the Commerce Clause).

169. 22 U.S. 1 (1824).

170. *Id.* at 196.

171. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (finding the Bituminous Coal Conservation Act of 1935 to be an invalid use of Congress's commerce power based on the distinction between "production" and "commerce," with production being viewed as a purely local activity); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act unconstitutional as applied to *Schechter Poultry* because *Schechter's* activities were not in the "current of commerce" or "affecting commerce"); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down a federal statute which prohibited interstate transport of any articles produced by companies employing young children under certain conditions), *overruled by United States v. Darby*, 312 U.S. 100 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that Congress could not forbid a monopoly in "manufacture" under the Commerce Clause because such activity was under the states' power to regulate local activity).

172. Prior to the Supreme Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court significantly constrained Congress's power under the Commerce Clause by imposing a variety of formal limitations. In *Jones & Laughlin Steel*, the Court, signaling a less restrictive view of Congress's Commerce Clause power, upheld the National Labor Relations Act of 1935, which created the right to form unions and required employer participation in collective bargaining, despite the statute's regulation of manufacturing and only indirect effect on interstate commerce. See *id.* at 38-40. The Court found a sufficient nexus to interstate commerce because the legislation targeted activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *Id.* at 37. See also *Perez v. United States*, 402 U.S. 146, 147 (1971) (upholding Title II of the Consumer Credit Protection Act); *United States v. Darby*, 312 U.S. 100, 123 (1941) (upholding the Fair Labor Standards Act).



retracting the scope of that power. Judge Luttig's dissent in *Brzonkala* made clear that he considers *Lopez* a decision marking an "overarching change in Commerce Clause analysis."<sup>173</sup>

As noted by the *Doe*, *Brzonkala*, and *Seaton* courts, one of the most far-reaching examples of the Supreme Court's deference to Congress's use of its commerce power is found in *Wickard v. Filburn*.<sup>174</sup> In *Wickard*, the Supreme Court upheld the application of a federal regulation limiting the amount of wheat an individual could grow on his farm for his own consumption.<sup>175</sup> The Court found that the subject of the regulation was sufficiently linked to interstate commerce.<sup>176</sup> In *Doe*, the court considered *Wickard* as instructive in "setting forth the outer-limit of Congress' [sic] authority to regulate private intra-state conduct" in the absence of any specific test to determine whether the activity "substantially affects" interstate commerce.<sup>177</sup> The *Doe* court drew an analogy, stating:

Certainly the repetitive nationwide impact of women withholding, withdrawing or limiting their participation in the workplace or market-place 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.<sup>178</sup>

In *Lopez*, the Court confirmed that mining coal,<sup>179</sup> extorting a loan,<sup>180</sup> running a restaurant or hotel,<sup>181</sup> and growing wheat,<sup>182</sup> though each was an *intrastate* activity, were commercial activities validly regulated by Congress.<sup>183</sup> All of these cases, however, involved a commercial

173. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 974 (4th Cir. 1997) (Luttig, J., dissenting). Judge Luttig criticized the majority's "analytical superficiality" and "manifest misreading" of *Lopez* leading to "its fundamental misunderstanding of the import of that decision." *Id.*

174. 317 U.S. 111 (1942).

175. *See id.* at 128-29.

176. *See id.* at 127-29. The Court reasoned that while one farmer's excess production might not have a significant impact on interstate commerce, the same conduct repeated by those similarly situated could have a significant impact on interstate commerce by reducing market prices for wheat. *See id.*

177. *Doe v. Doe*, 929 F. Supp. 608, 614 (D. Conn. 1996).

178. *Id.* Congress regulated wheat production to prevent fluctuations in wheat prices. *See id.* Because Filburn grew wheat in excess of his quota, he did not buy wheat on the market. *See id.* His actions defeated Congress's goal by reducing market demand and wheat prices. *See id.* The *Brzonkala* court criticized the *Doe* court's use of *Wickard* in this analogy due to its obvious commercial character. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 791-92 (1996).

179. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

180. *See Perez v. United States*, 402 U.S. 146 (1971).

181. *See Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

182. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

183. *United States v. Lopez*, 514 U.S. 549, 563 (1995) (concluding that where economic activity substantially affects interstate commerce, legislation regulating that activity will be

element that was fairly evident. Therefore, in viewing the use of the Commerce Clause power in cases where the commercial character of the regulated conduct or activity is "not visible to the naked eye," the less clearly economic cases are more instructive. *Katzenbach v. McClung*<sup>184</sup> and *Heart of Atlanta Motel, Inc. v. United States*<sup>185</sup> both involved activity (racial discrimination) with a connection to commerce that arguably was not "visible to the naked eye," but that activity was held to be validly regulated by Congress.

The *Lopez* Court reiterated that, in regulation of intrastate activities which do not involve channels of interstate commerce or instrumentalities of interstate commerce, the test is whether the regulated conduct "substantially affects" interstate commerce.<sup>186</sup> In determining whether the conduct substantially affects interstate commerce, the Court reaffirmed the "rational basis" test announced in *Hodel*.<sup>187</sup> In employing the *Hodel* test, courts naturally look to the legislative history surrounding the enactment of the suspect statute to discern if Congress indeed had a rational basis for determining that the regulated activity substantially affected interstate commerce. As Justice Souter pointed out in his *Lopez* dissent, the Supreme Court stated in *Katzenbach v. McClung* that, "here we find 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, our investigation is at an end."<sup>188</sup>

Justice Souter's dissent in *Lopez* also brings to light the judicial slight of hand attempted by the *Lopez* majority. He pointed out that the standard applied by the majority was actually much stricter than a rational basis review.<sup>189</sup> Although the majority applied a stricter test than the *Hodel* "rational basis" test, it cited *Hodel* to support its position.<sup>190</sup> Justice Souter highlighted the fact that the majority upset the traditional analysis by indicating that less deference to legislative findings is appropriate when the regulated activity is non-commercial in nature.<sup>191</sup> He also warned that the majority's concern about federalism signaled a possible return to a more intrusive review, which was

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sustained); see also *id.* at 573-74 (Kennedy, J., concurring) ("These and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today.").

184. 379 U.S. 294 (1964).

185. 379 U.S. 241 (1964).

186. See *United States v. Lopez*, 514 U.S. at 558-59.

187. See *id.* at 557 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-80 (1981)).

188. See *id.* at 607 (Souter, J., dissenting) (quoting *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964)).

189. See *id.* at 608-09 (Souter, J., dissenting).

190. See *id.* at 557-58 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 276-77).

191. See *id.* at 608 (Souter, J., dissenting).

inconsistent with the judicial role.<sup>192</sup> Because of the cloud of confusion and uncertainty hanging over the *Lopez* decision, the dissenting opinions in the decision may prove to be as important as the majority opinion.

In the Fourth Circuit's *Brzonkala* decision, Judge Luttig's dissent criticized the majority's "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."<sup>193</sup> Judge Luttig, evidently failing to give *any* weight to the mass of testimony in the record, proceeded to state that the "majority's wholesale deference to a committee finding would at least be understandable if that committee had made extensive findings deserving of deference."<sup>194</sup>

There are two principal flaws in this position. First, Judge Luttig apparently failed to consider any of the testimony offered that specifically addressed the economic effects of violence against women. For example, domestic violence alone is estimated to cost this country "at least 3 billion . . . dollars a year" due to lost careers, decreased productivity, long-term health problems, and other societal expenses.<sup>195</sup> Second, Judge Luttig failed to consider the role that the judiciary plays in the constitutional review of statutes. That role does not call for second guessing of Congress's findings but, instead, requires that the court simply ensure that Congress had a rational basis upon which to rest its legislative decisions.

In upholding the constitutionality of the VAWA, the Fourth Circuit majority acknowledged that "every act of Congress is entitled to a 'strong presumption of validity and constitutionality' and will be invalidated only 'for the most compelling constitutional reasons.'"<sup>196</sup> The Fourth Circuit majority supported this narrow view of the courts' role by citing recent Supreme Court cases calling for deference and restraint in reviewing legislative judgments.<sup>197</sup> The majority recognized that "[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

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192. See *id.* (Souter, J., dissenting).

193. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 975 (4th Cir. 1997).

194. *Id.* at 976 (Luttig, J., dissenting). Justice Luttig characterized the legislative findings as showing "the enormity of the problem of domestic violence," but not "the problem's effects on interstate commerce." *Id.*

195. S. REP. NO. 101-545, at 33 (1990) (citing E. Schneider, "Legal Reform Efforts for Battered Women: Past, Present, and Future," at 4 (prepared for the Ford Foundation, July, 1990)).

196. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d at 964 (quoting *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984) and *Mistretta v. United States*, 488 U.S. 361, 384 (1989)).

197. See *id.*; see also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (stating that deference to such judgments by the legislature constitutes the "paradigm of judicial restraint"); *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (stating that a court should "not lightly second-guess such legislative judgments").

relatively narrow.”<sup>193</sup> The court quoted Justice Kennedy’s concurrence in *Lopez*, stating that “[t]he 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.”<sup>199</sup> The Fourth Circuit realized that a reviewing court need only determine whether a rational basis exists for concluding that a regulated activity substantially affects interstate commerce.

### *B. The Role of Congressional Findings in Commerce Clause Review*

The analysis of Congress’s legislative findings is a crucial step in determining whether Congress validly acted within its Commerce Clause powers, particularly when the connection to interstate commerce is not “visible to the naked eye.” In *Lopez*, the Court was essentially left to its own devices (and Justice Breyer’s own research)<sup>200</sup> to make the connection between the GFSZA and interstate commerce. Contrary to the *Brzonkala* court’s suggestion, the dearth of legislative findings was not “merely incidental” to the Court’s decision in *Lopez*.<sup>201</sup> Rather, the Court had no findings to consider in determining whether Congress had a rational basis to find that guns in school zones had an effect on interstate commerce.<sup>202</sup>

The *Doe*, *Brzonkala*, and *Seaton* courts correctly found that the civil rights provision of the VAWA could only be upheld if violence against women “substantially affects” interstate commerce. As the *Seaton* court correctly stated, even after *Lopez*, the test under which courts must review the constitutionality of a statute enacted under the Commerce Clause is the rational basis test announced in *Hodel*.<sup>203</sup> It is neither logical nor reasonable to believe that judges have an independent base of knowledge from which they can determine whether all regulated activity affects interstate commerce, particularly when the connection is not “visible to the naked eye.” Therefore, it is logical and necessary for courts to consider the congressional findings to discern whether Congress indeed had a rational basis for determining that the regulated activity substantially affects interstate commerce.

The *Doe* and *Seaton* courts placed the proper emphasis on Congress’s vast findings in employing the *Hodel* rational basis test, as did the Fourth

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198. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d at 965 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276 (1981)).

199. *Id.* at 965 (quoting *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring)).

200. See Harvey Berkman, *Court Declares ‘No Trespass’: The three branches and the states should go to their respective corners*, NAT’L L.J., July 14, 1997, at A26 (quoting Professor Gerald Gunther, stating that in *Lopez* Justice Breyer did the research to show the effects of guns in schools, not Congress).

201. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 779, 790 (1996).

202. See *United States v. Lopez*, 514 U.S. at 562.

203. See *supra* text accompanying notes 156-58.

Circuit in *Brzonkala*. Those courts deferred to Congress's judgment after viewing the findings because it was reasonable for Congress to find that violence against women has a substantial effect on the national economy and, therefore, affects interstate commerce. On the contrary, the trial court in *Brzonkala* determined that it could either choose to consider such findings, or it could find the connection itself. The court chose the latter option and undertook the task of finding the connection absent a consideration of the findings. Failing to see a strong enough nexus between violence against women and interstate commerce, it then determined that Congress had overreached its commerce power. This type of analysis, ignoring congressional findings, is unreasonable and unwise. Legislation with as much factual support as the VAWA should not be ruled invalid because a court fails to give proper weight to that support.

### C. The Rehnquist Court and Federalism

After reviewing the *Lopez* Court's pronouncements and recent Supreme Court decisions relating to judicial review of legislation based on the Commerce Clause, it may seem that *Lopez* was intended to apply narrowly and that the VAWA is secure. This security may, however, be unfounded: *Lopez* cannot be dismissed as judicial censure and may indeed have a significant effect due to the Rehnquist Court's policing of matters of structure.<sup>204</sup> Some commentators, grouping *Lopez* with the Court's decisions that same term in *United States Term Limits, Inc. v. Thornton*<sup>205</sup> and *Missouri v. Jenkins*,<sup>206</sup> have offered a more dramatic assessment, contending that *Lopez* in fact signaled a turning point in the Court's basic approach to federalism.<sup>207</sup> Speculation about the reach of *Lopez* further intensified in the wake of the Court's decision the following term in *Seminole Tribe v. Florida*.<sup>208</sup> In *Seminole Tribe*, the

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204. See Wendy M. Rogovin, *The Politics of Facts: The Illusion of Certainty*, 46 HASTINGS L.J. 1723, 1725 & n.6 (1995) (interpreting *Lopez* and several other recent decisions as showing the Rehnquist Court moving away from deference to Congress); see also Berkman, *supra* note 200, at A1:

Highway road crews periodically repaint faded dividing lines to restore their clarity and brightness. According to several scholars, that's what the U.S. Supreme Court did in the 1997 spring term: merely retouch the lines on the familiar Constitutional highway. . . . The Court ended its term with a remarkable series of decisions involving the Constitution's separation of powers, a longtime interest of the Chief Justice William H. Rehnquist.

*Id.* Berkman further discussed how the Rehnquist Court struck down three federal laws in one week: the Brady Gun Control Act, the Religious Freedom Restoration Act, and the Communications Decency Act. See *id.*

205. 514 U.S. 779 (1995) (holding that states may not impose additional qualifications for congressional or senatorial office outside of those set forth by the Constitution).

206. 515 U.S. 70 (1995) (holding that the district court's orders had exceeded the scope of federal power to remedy the effects of past discrimination in the state school system).

207. See generally Berkman, *supra* note 200.

208. 517 U.S. 44 (1996).

Court held that Congress lacked authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity from suit in federal court.<sup>209</sup> In a front-page story the day after the Court issued its opinion in *Seminole Tribe*, the *New York Times* reported that it had become "evident now that the *Lopez* decision was a signal that the current majority is in the process of revisiting some long-settled assumptions about the structure of the Federal Government and the constitutional allocation of authority between Washington and the states."<sup>210</sup>

In response to such a grave warning, those on the other side of the debate point to the language of the Court in *Lopez*, including Justice Kennedy's concurrence (joined by Justice O'Connor), expressly reaffirming the Court's expansive interpretation of the power of Congress to regulate interstate commerce.<sup>211</sup> When focusing on the language of the Court, the *Lopez* opinion appears not to redefine the Court's view of Congress's commerce power but rather to limit that power, signaling when Congress has gone "too far." In fact, the majority in *Lopez* indicated that it intended to set an outer limit on Congress's Commerce Clause authority, not to depart from well-established Commerce Clause precedent.<sup>212</sup> Commentators note that "[c]ases like *Lopez* . . . result less from any incipient high court activism trampling the political branches than from an increase in congressional indolence."<sup>213</sup> Among those legal scholars who view such Supreme Court statements as dispositive on the reach of *Lopez* is Stanford Law School Professor Emeritus Gerald Gunther, an expert on constitutional law, who stated:

Lawmakers have gotten so lazy that they feel they can legislate and let the court do the rest of the work . . . . That's what [Justice Stephen G.] Breyer did in *Lopez*: He did the research . . . for them. The appendix to his opinion . . . was his research not Congress', as to what the impact on commerce might be.<sup>214</sup>

With regard to Title III of the VAWA, the fears about federalism are misplaced. Unlike the GFSZA at issue in *Lopez*, the civil rights provision is not a criminal statute and it displaces no state criminal law. Moreover, in deference to areas traditionally encompassed by state law such as divorce and child custody, Congress expressly limited the reach of the VAWA, stating that it does not "confer on the courts of the United States jurisdiction over any State law claim seeking establishment of a divorce, alimony, equitable distribution of marital property, or child

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209. See *id.* at 47.

210. Linda Greenhouse, *Justices Curb Federal Power to Subject States to Lawsuits*, N.Y. TIMES, Mar. 28, 1996, at A1.

211. See *United States v. Lopez*, 514 U.S. 549, 556-57; see also *id.* at 568 (Kennedy, J., concurring).

212. See *id.* at 566-67.

213. Berkman, *supra* note 200, at A26.

214. *Id.* (quoting Professor Gerald Gunther).

custody decree.”<sup>215</sup> Critics would say that this proscription is illusory, pointing to the fact that several of the Title III cases arising thus far, such as *Doe* and *Seaton*, are actually disputes stemming from marital dissolution and, indeed, have the effect of bringing family law matters into the federal courts. Even if this contention has merit, there are civil rights arguments that defeat federalism concerns regarding the VAWA’s civil rights provision.

#### *D. Civil Rights and the Commerce Clause*

Unlike the GFSZA, Title III of the VAWA does not address an area of law solely occupied by the state. Instead, it involves civil rights, an area traditionally regulated by the federal government. Title III stemmed from the joining of civil rights and the Commerce Clause, which is not a novel arrangement.<sup>216</sup> In *Katzenbach v. McClung*<sup>217</sup> and *Heart of Atlanta Motel, Inc. v. United States*,<sup>218</sup> the Supreme Court sanctioned Congress’s use of the Commerce Clause to regulate racial discrimination.<sup>219</sup> The Civil Rights Act of 1964 required public establishments, such as restaurants and hotels, to serve their customers without regard to their race or color.<sup>220</sup> For instance, in *Katzenbach* the Court upheld that provision of the Act as a valid exercise of the commerce power because of the effects of racial discrimination on interstate travel and because the food served in the restaurant had moved in interstate commerce.<sup>221</sup> Detractors of the expansive use of the commerce power could reasonably argue that these and many other cases allowed for the use of the commerce power even when the effects on interstate commerce were remote and speculative. In fact, the Civil Rights Act contained no congressional findings about the impact of discrimination in public accommodations on commerce. The Court, however, found a rational basis upon which Congress could conclude that the chosen regulatory scheme was necessary for the protection of commerce.

The *Lopez* Court paid little attention to *Katzenbach* and *Heart of Atlanta*. This avoidance could be explained on the basis that the GFSZA was a criminal statute, which displaced state law, while *Katzenbach* and *Heart of Atlanta* dealt with racial discrimination. It is clear, however, that those two decisions are important to the consideration of the

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215. 42 U.S.C. § 13981(e)(4) (1994).

216. See Anna Kampourakis & Robin C. Tarr, Note, *About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez*, 11 ST. JOHN’S J. LEGAL COMMENT. 191, 193-98 (1995) (giving a brief history of the origin of Congress’s use of the Commerce Clause in civil rights legislation).

217. 379 U.S. 294 (1964).

218. 379 U.S. 241 (1964).

219. See *Katzenbach v. McClung*, 379 U.S. at 304; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 261-62.

220. See 42 U.S.C. § 2000a-1 (1994); see, e.g., *Katzenbach v. McClung*, 379 U.S. at 298.

221. See *Katzenbach v. McClung*, 379 U.S. at 304; see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 261.

challenges facing Title III of the VAWA because of their importance in the history of civil rights. Viewing those cases in concert with subsequent instances of federal statutory creation and protection of civil rights demonstrates how civil rights and the Commerce Clause have been successfully joined in the past. This connection has endured judicial scrutiny before and should continue to withstand scrutiny now. The findings surrounding the VAWA clearly demonstrate a strong economic connection between violence against women and the national economy. Courts can, have, and should find that Congress had a rational basis upon which to rest the enactment of the VAWA.

#### *E. The Fourteenth Amendment Alternative*

Although this Comment concludes that the VAWA is constitutionally sound under the Commerce Clause, it should be noted that some legal scholars and commentators have suggested that the authority granted by the Fourteenth Amendment is a more logical base of power than the Commerce Clause under which to uphold the VAWA.<sup>222</sup> The arguments for upholding the statute under the Fourteenth Amendment maintain that state laws often deny remedies to victims of gender-motivated violence, and that the inconsistencies in state laws serve to protect victims in some states while leaving no remedy for victims in other states.<sup>223</sup> For example, a man who rapes his wife or cohabitant may be subject to less strict criminal sanctions than a man who rapes a stranger.<sup>224</sup> In some states he may be subject to no criminal penalty for raping his wife or cohabitant.<sup>225</sup> In several states, "women who are beaten or assaulted by their husbands still are denied access to a tort remedy by interspousal tort immunity doctrines."<sup>226</sup>

In *Katzenbach v. Morgan*,<sup>227</sup> the Court stated that "correctly viewed, Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is

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222. See, e.g., David E. Rovella, *Judge OKs 'Violence' Act: The Commerce Clause Is Invoked to Sustain the Violence Against Women Act*, NAT'L L.J., July 8, 1996, at A6. In discussing *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996), Rovella's article stated:

[C]onstitutional law experts said Judge Arterton's rationale is extremely vulnerable to reversal because it turned on her reading of *U.S. v. Lopez*. . . . "The judge chose a dangerously weak argument. *Lopez* at least involved a gun—a manufactured item—as a connection to commerce," said Judy Beckner Sloan, a professor of women's legal issues at Southwestern University School of Law in Los Angeles. She said the district court should have relied on the 14th Amendment's equal protection clause.

*Id.*

223. See Goldscheid & Krahm, *supra* note 42, at 519 nn.114-15 (noting the states that still recognize interspousal immunity defense; the states that have repudiated the defense; and the states that have limited its applicability).

224. See *id.* at 506.

225. See *id.*

226. *Id.*

227. 384 U.S. 641 (1966).



needed to secure the guarantees of the Fourteenth Amendment."<sup>228</sup> Congress can exceed the self-executing provisions of the Fourteenth Amendment by outlawing practices it finds to violate Section 1, even if the courts have specifically ruled that such practices do not violate the Fourteenth Amendment. According to the *Civil Rights Cases*,<sup>229</sup> "[i]f the laws themselves make any unjust discrimination . . . Congress has full power to afford a remedy under that amendment and in accordance with it."<sup>230</sup> Therefore, Congress has wide latitude under the Fourteenth Amendment as long as Congress's acts have some reasonable possibility of addressing a legitimate equal protection concern.

The problem, of course, is that the Fourteenth Amendment does not empower Congress to legislate against private acts of violence.<sup>231</sup> Some authority, however, indicates that Congress may address seemingly private conduct via Section 5 of the Fourteenth Amendment in the absence of concrete and express state action.<sup>232</sup> Under this view, the involvement of the State need not be either "exclusive or direct."<sup>233</sup> In fact, even "peripheral" state action may be sufficient "to create rights under the Equal Protection Clause."<sup>234</sup>

By invoking the Fourteenth Amendment as a second base of power in its enactment of the VAWA, Congress relied on a theory of state complicity in the treatment of certain violent crimes against women. While it is clear that state inaction is not sufficient to allow the extension of the Fourteenth Amendment to private conduct, in recent years courts have attempted to draw lines and outline the parameters of exactly when this extension may occur and what type of connection to private conduct is sufficient. This line is currently unclear, but the idea has been expressed that if the state breaches its duty to protect a right by allowing others to violate it, such inaction may suffice to allow an extension to the violative private conduct.<sup>235</sup> The failure of law enforcement officials nationwide to adequately protect victims of domestic violence, and the

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228. *Id.* at 651. In *Katzenbach v. Morgan*, the Supreme Court upheld a legislative ban on literacy tests for voting, though it had not found such tests to be discriminatory. *See id.* at 657-58.

229. 109 U.S. 3 (1883).

230. *Id.* at 25.

231. *See, e.g.,* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) (Stevens, J., concurring) (stating that the Fourteenth Amendment does not authorize Congress to create rights against private individuals even where gender discrimination is involved).

232. *See, e.g.,* *United States v. Guest*, 383 U.S. 745, 754-56 (1966) (suggesting, but not deciding, that Congress may reach private conduct under Section 5 of the Fourteenth Amendment).

233. *Id.* at 755.

234. *Id. But see* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (finding that conduct allegedly causing the deprivation of a federal right must be fairly attributable to the state).

235. *See* Laurence H. Tribe, *The Constitutionality of the Freedom of Access to Clinic Entrances Act of 1993*, 1 VA. J. SOC. POL'Y & L. 291, 298 (1994) (stating that a state's inability to resolve problems justified congressional intervention to protect constitutional rights).

bias in the system that those victims and victims of sexual assault currently face, surely give rise to legitimate equal protection concerns.<sup>236</sup>

## VI. CONCLUSION

In enacting the VAWA, Congress recognized that gender motivates rapes, sexual assaults, and beatings. To provide women with the means of enforcing their right to be free from gender-motivated violence, Congress included the civil rights remedy.<sup>237</sup> In doing so, Congress invoked the same powers used in enacting other civil rights statutes, which have weathered constitutional challenges and provided redress for many wronged plaintiffs.<sup>238</sup>

The treatment of the VAWA in the courts is similar to that which many other federal statutes currently face. At the heart of it all lies *Lopez*. What effect did the Court intend *Lopez* to have on Congress's Commerce Clause power? Does *Lopez* signal a retraction of the expansiveness of that power? Is *Lopez* simply an aberration limited to

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236. See Lisa A. Carroll, Comment, *Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803 (1997) (describing ineffective responses to violence against women by the states); see also Melanie L. Winskie, *Can Federalism Save the Violence Against Women Act?*, 31 GA. L. REV. 985, 985 n.1 (1997), for a collection of sources

revealing that Florida judge stated during sentencing that he pitied rapist because female victim was "pathetic" . . . ; judge stated during hearing that domestic violence victim "probably should have been hit" . . . ; a prosecutor discounted testimony of 15-year-old girl and asked questions such as "Come on, you can tell me. You're probably just worried that your boyfriend got you pregnant, right? Isn't that why you're saying he raped you?" . . . ; judge "led the courtroom in laughter as the woman [domestic violence victim who was subsequently killed by her estranged husband] left" . . . ; detective told mother of 14-year-old rape victim that because the child only said "no" once, incident may not constitute rape . . . ; judge commented in court that he did not believe domestic violence victim's testimony "because I don't believe that anything like this could happen to me" . . . ; probation officer stated that nine-year-old girl may not be "real victim" because she was rumored to be "a tramp" . . . .

*Id.* (internal citations omitted).

237. For a different view of Congress's possible motivations, see Patricia Schroeder, *Stopping Violence Against Women Still Takes a Fight: If in Doubt, Just Look at the 104th Congress*, 4 J.L. & POL'Y 377, 377 (1996) (implying the commitment to ending violence against women only ran as deep as the 1994 elections). Ms. Schroeder, a long-term member of Congress from Colorado, observes:

At the end of the 1994 congressional session, the U.S. House of Representatives unanimously passed VAWA . . . . Certainly, every member seeking reelection wanted to be seen as taking a strong stand against the insidious problem of violence against women.

But with the 1994 elections, a dark shadow fell over VAWA: When it came to funding this landmark legislation, the new Congress wanted none of it.

*Id.*

238. See, e.g., 42 U.S.C. § 1981 (1994) (popularly referred to as Title VII); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964) (upholding the constitutionality of Title II of the Civil Rights Act of 1964 as applied to a motel); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (upholding the constitutionality of Title II of the Civil Rights Act of 1964 as applied to restaurants).

its specific facts? These questions are central to the debate over the constitutionality of the VAWA.

As many predicted, *Lopez* has prompted many constitutional challenges to federal legislation, but few have succeeded.<sup>239</sup> Courts have consistently upheld federal legislation enacted pursuant to the Commerce Clause. As the *Seaton* court noted, "most courts have resisted urgings to extend *Lopez* beyond [the GFSZA]."<sup>240</sup>

The confusion over the post-*Lopez* reach of Congress's commerce authority must be dispelled so that plaintiffs bringing actions under federal statutes validly enacted pursuant to this power are not denied their day in court. The *Seaton* court was correct in adopting the Sixth Circuit's position "that until the Supreme Court provides a clearer signal or cogent framework to handle this [Commerce Clause-based] legislation" after *Lopez*, it will adhere to prior Commerce Clause jurisprudence and exercise significant restraint.<sup>241</sup>

While the reversal of *Brzonkala* by the Fourth Circuit seems to place the VAWA on more secure ground for the meantime, *Lopez* remains enigmatic to courts. The speculation created by recent Supreme Court decisions, seemingly focusing on federalism concerns, adds another layer of uncertainty to the VAWA's future. Inevitably, the Supreme Court will have to clarify *Lopez* and its effects on Congress's Commerce Clause power. As Judge Luttig pointed out in his dissent in *Brzonkala*, the debate over the constitutionality of the VAWA "pristinely presents" the opportunity for the Supreme Court to revisit its pronouncements in *Lopez* and offer much needed clarification.<sup>242</sup> When the Court does clarify *Lopez*, it should affirm the propriety of the *Hodel* "rational basis" test, encourage deference by the courts to congressional findings, and

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239. See, e.g., *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1996) (upholding criminalization of gambling operations of a certain size); *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996) and *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (upholding Freedom of Access to Clinic Entrances Act); *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996) (upholding statute prohibiting possession of firearm). For additional decisions upholding federal statutes facing Commerce Clause challenges, see *United States v. Genao*, 79 F.3d 1333 (2d Cir. 1996); *United States v. Coleman*, 78 F.3d 154 (5th Cir. 1996); *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995), cert. denied, 116 S. Ct. 681 (1995); *United States v. Robinson*, 62 F.3d 234 (8th Cir. 1995); *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995); *United States v. Williams*, 51 F.3d 1004 (11th Cir. 1995), cert. denied, 116 S. Ct. 258 (1995); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995); and *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995), cert. denied, 116 S. Ct. 55 (1995).

240. *Seaton v. Seaton*, 971 F. Supp. 1188, 1193 (E.D. Tenn. 1997) (quoting *United States v. Wall*, 92 F.3d at 1448).

241. *Id.* at 1194.

242. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 997 (4th Cir. 1997) (Luttig, J., dissenting). Judge Luttig prophesied

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.

*Id.* (Luttig, J., dissenting).

thereby ensure that validly enacted federal statutes, such as the VAWA, remain intact through narrow judicial review.

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