

# The Violence Against Women Act of 1994<sup>†</sup>: Connecting Gender-Motivated Violence to Interstate Commerce

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Just as it is important to "document that cross burnings are more than 'arson' and that swastikas painted on synagogues are more than 'vandalism,'" it is important to recognize gender-motivated violence for what it is: a violent form of gender oppression.<sup>1</sup>

Most people in the United States intuitively understand that burning a cross on a front lawn of an African-American's home or defacing a Jewish house of worship with a Nazi symbol is wrong. Legally, however, those actions were not prohibited until thirty-four years ago, when Congress passed landmark civil rights legislation.<sup>2</sup> Most people also instinctively know that targeting an individual for oppression based on gender is morally wrong. But unlike the protection of the law for those who might be targeted because of race or religion, a victim of gender-motivated violence only recently received the protection of federal laws. In 1994, Congress enacted the Violence Against Women Act (VAWA),<sup>3</sup> which created a civil right to be free from gender-motivated violence. And, like the race-based civil rights legislation that was repeatedly attacked on constitutional grounds, VAWA is currently the subject of heated debates in federal courts. While those earlier civil rights were created under the auspices

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† 42 U.S.C. § 13981 (1994).

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1. Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crime Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 179 (1994) (quoting 134 CONG. REC. H3373, H3378 (daily ed. May 18, 1988), statement of Rep. Kennelly).

2. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (1994)).

3. 42 U.S.C. § 13981 (1994).

of the Fourteenth Amendment's Equal Protection Clause,<sup>4</sup> Congress created VAWA through use of its enumerated power to regulate interstate commerce.<sup>5</sup> But is gender-motivated violence sufficiently connected to interstate commerce to justify Congress's use of its commerce power?

The notion of "interstate commerce" has changed dramatically since the Constitution was adopted over 200 years ago. While Congress could regulate, through its commerce power, the delivery of goods between Vermont and New York in 1789, wholly intrastate commercial activities were not under congressional authority.<sup>6</sup> Today, however, Congress may exercise its commerce authority to regulate wholly intrastate activities with little direct connection to commerce if it finds that those activities substantially affect interstate commerce.<sup>7</sup> Congress's commerce power has significantly expanded over the years, but has it expanded enough to cover the creation of VAWA's civil right to be free from gender-motivated violence?

The answer to that question became murkier in 1995, when the United States Supreme Court complicated the Commerce Clause debate with its ruling in *United States v. Lopez*.<sup>8</sup> In a five-to-four decision, the Court struck down the Gun-Free School Zones Act, holding that Congress, in enacting the legislation, overstepped the

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4. The Fourteenth Amendment states: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. CONST., amend. XIV, § 1.

5. The Commerce Clause, article 1, section 8, clause 3, of the United States Constitution, states: "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3. In addition, the Necessary and Proper Clause, article 1, section 8, clause 18, gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST., art. I, § 18.

6. See, e.g., *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that Congress could not use its commerce power to regulate activities with no direct impact on interstate commerce, as the power existed only to allow regulation of commerce between the states, and intrastate activities are, by definition, not interstate.).

7. See generally *Wickard v. Fillburn*, 317 U.S. 111, 118-129 (1942) (holding regulation of home-grown wheat consumption by the farmer impacted interstate commerce, although it was never in commerce at all); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that intrastate activities that have a substantial relationship to interstate commerce may be regulated by Congress through its commerce power); *United States v. Clark*, 67 F.3d 1154, 1165-66 (5th Cir. 1995) (holding Congress may ban the distribution of illegal drugs in a school zone under its commerce power); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395-96 (9th Cir. 1995) (holding that Congress may regulate private wetlands for the benefit of migratory waterfowl under its commerce power).

8. 514 U.S. 549 (1995).

boundary of its commerce power.<sup>9</sup> That fractured decision represents either a contraction of the previously expansive Commerce Clause authority or a limited ruling that has little or no impact on future commerce power debates. In the three years since *Lopez*, the high Court has denied certiorari on every case that deals with the Commerce Clause.<sup>10</sup>

VAWA's constitutionality could be the issue that the Supreme Court uses to clarify the *Lopez* ruling. In December 1997, a three-judge panel of the Fourth Circuit, in *Brzonkala v. Virginia Polytechnic and State University*, issued the first federal appellate court ruling on VAWA's constitutionality.<sup>11</sup> The Fourth Circuit has since vacated the panel's ruling and granted a rehearing en banc.<sup>12</sup> Regardless of the outcome of the en banc hearing, VAWA appears ripe for Supreme Court review. However, the question remains whether the Court will grant certiorari should the parties appeal the forthcoming Fourth Circuit en banc ruling.

This Comment explores whether the Supreme Court will grant certiorari in the *Brzonkala* case, and whether the Court will uphold VAWA as a constitutional use of the commerce power. Part I explains the provisions of VAWA. Part II scrutinizes the development of Commerce Clause jurisprudence, which culminated in the *Lopez* decision. Part III analyzes the panel's Fourth Circuit ruling in *Brzonkala*. Part IV reviews the Supreme Court's handling of post-*Lopez* Commerce Clause cases and discusses whether the Court will grant certiorari to a challenge of VAWA's constitutionality. Finally, Part V examines arguments regarding VAWA's constitutionality. This Comment concludes that the Supreme Court will probably deny certiorari in the *Brzonkala* case. However, should the Court grant review, it will likely find VAWA a constitutionally permissible use of the commerce power.

## I. THE VIOLENCE AGAINST WOMEN ACT OF 1994

Before analyzing whether VAWA is constitutional, one must first understand what VAWA provides and why Congress enacted it. VAWA permits victims of gender-motivated violence to sue in federal

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9. *Id.* at 551.

10. See *The Lopez Watch*, 21 ADMIN. & REG. L. NEWS 4, 4 (Winter 1996); see also docket of U.S. Supreme Court for 1997-98; and docket of U.S. Supreme Court for 1996-97, available in 7-9-96 West's Legal News 6599, 1996 WL 379521.

11. *Brzonkala v. Virginia Polytechnic and State University*, 132 F.3d 949 (4th Cir. 1997), vacated and reh'g en banc granted (Order Granting Rehearing, Feb. 5, 1998, (Case No. 96-1814)).

12. *Id.*

court to recover compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.<sup>13</sup> The congressional purpose in enacting the legislation was "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."<sup>14</sup>

VAWA's civil right is simply that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."<sup>15</sup> But that seemingly broad right was significantly narrowed later in the statute when Congress defined a "crime of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender[.]"<sup>16</sup> In addition, Congress further limited access to a VAWA claim by excluding "random acts of violence *unrelated to gender*"<sup>17</sup> and "acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender[.]"<sup>18</sup>

Congress claimed it had the authority to enact VAWA under both the Commerce Clause and under the Equal Protection Clause of the Fourteenth Amendment.<sup>19</sup> Before *Lopez* in 1995, the Supreme Court's Commerce Clause jurisprudence seemed to support Congress's claim. However, *Lopez* called into question both the breadth of the commerce power and VAWA's constitutionality.

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13. 42 U.S.C. § 13981(c) (1994).

14. *Id.* § 13981(a).

15. *Id.* § 13981(b).

16. *Id.* § 13981(d)(1).

17. *Id.* § 13981(e)(1) (emphasis added).

18. *Id.* § 13981(e)(1).

19. This Comment will deal only with the Commerce Clause. For analysis of the Equal Protection Clause as a basis for upholding VAWA's constitutionality, see generally Johanne R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849 (1997); Chris A. Rauschl, Comment, *Brzonkala v. Virginia Polytechnic and State University: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits*, 81 MINN. L. REV. 1601 (1997).

## II. THE COLLISION OF EXPANSIVE AND RESTRICTIVE COMMERCE CLAUSE JURISPRUDENCE

The debate over VAWA's constitutionality joins a long line of Commerce Clause debates, many of which came before the U.S. Supreme Court.<sup>20</sup> Some scholars argue that Congress has long used the Commerce Clause to pass legislation beyond the authority granted by the Constitution,<sup>21</sup> while others contend that Congress's commerce power is so broad that, as long as a rational basis exists to connect an activity to interstate commerce, any legislation is constitutional.<sup>22</sup>

### A. *The Commerce Clause Cases Prior to 1995*

The Supreme Court restricted congressional use of the commerce power in the early part of this century by requiring regulations to have a direct link to interstate commerce.<sup>23</sup> During this period, the Court struck down legislation when the activities regulated had no direct impact on interstate commerce. The Court held that such legislation went beyond the scope of a power that existed only to allow congressional regulation of interstate commerce.<sup>24</sup>

However, the Court retreated from such a restrictive view of congressional authority in the New Deal Era. As Congress promulgated legislation to carry out the social agenda of the period, links between interstate commerce and the activities regulated became progressively weaker and more indirect.<sup>25</sup> But instead of striking down such legislation, the Supreme Court upheld even regulation of wholly intrastate activities<sup>26</sup> and activities that were not strictly "commer-

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20. See, e.g., *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Wickard v. Fillburn*, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971).

21. See, e.g., Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV., 167 (1996).

22. See, e.g., Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996).

23. See, e.g., *A.L.A. Schecter Poultry Corp.*, 295 U.S. 495 (striking down regulations fixing hours and wages of those employed by an intrastate business because the activity being regulated only indirectly impacted interstate commerce).

24. *Id.*

25. See, e.g., *Jones & Laughlin Steel Corp.*, 301 U.S. at 1 (holding that intrastate activities that have a substantial relationship to interstate commerce may be regulated by Congress through its commerce power, effectively departing from the direct-indirect distinction).

26. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (wages and hours for employees in a lumber mill); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (the price of milk produced, processed, and sold in Illinois).

cial."<sup>27</sup> The Court allowed legislation to stand so long as Congress had a rational basis for finding at least a minimal connection to interstate commerce.<sup>28</sup> While the Court indicated that some limit existed on Commerce Clause power, it declined to draw that line.<sup>29</sup> Such deference to Congress continued until the *Lopez* decision in 1995, when the Court drew a line, albeit one that is far from bright.

### B. *United States v. Lopez*

In 1995, the Supreme Court struck down the Gun-Free School Zones Act of 1990<sup>30</sup> by a five-to-four vote in *United States v. Lopez*.<sup>31</sup> The Act made it a federal crime to possess a gun in a school zone.<sup>32</sup> The fractured Court included six justices who either dissented outright or concurred with strong reservations.<sup>33</sup> The majority opinion, authored by Chief Justice Rehnquist and joined by Justices Kennedy, O'Connor, Scalia, and Thomas, held that Congress exceeded its Commerce Clause authority in passing the Act because carrying a gun in a school zone does not substantially affect interstate commerce.<sup>34</sup> However, Justices Kennedy and O'Connor filed a reserved concurrence hinting that they might break with the other three justices on future Commerce Clause cases, although they agreed that the law at issue in *Lopez* was unconstitutional.<sup>35</sup> Meanwhile, the spirited dissents filed by Justices Breyer, Stevens, Souter, and Ginsburg promised a continuing battle should the Court attempt to apply *Lopez* to future Commerce Clause cases.<sup>36</sup>

#### 1. The Majority's View of the Commerce Clause Power

Writing for the majority, Chief Justice Rehnquist declared that Congress exceeded its Commerce Clause authority when it passed the

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27. See *Wickard*, 317 U.S. 111 (holding the consumption of home-grown wheat, while not commercial in itself, affected interstate commerce because the impact on the interstate wheat market if all farmers ate wheat they grew rather than wheat they purchased was "far from trivial").

28. *Id.* at 118-29.

29. See *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) (stating that although Congress's commerce power was broad, it had limits that the Supreme Court had "ample power" to enforce).

30. 18 U.S.C. § 922(q) (Supp. 1998).

31. *Lopez*, 514 U.S. 549 (1995).

32. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2)(A) (1998 Supp. 1998).

33. See *Lopez*, 514 U.S. at 568-631.

34. *Id.* at 551-68.

35. *Id.* at 568-83 (Kennedy and O'Connor, JJ., concurring).

36. *Id.* at 602-03 (Stevens, J., dissenting); *id.* at 603-15 (Souter, J., dissenting); *id.* at 615-31 (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting).

Gun-Free School Zones Act.<sup>37</sup> The Court ruled that the Act "neither regulates a commercial activity nor contains a requirement that the [firearm] possession be connected in any way to interstate commerce."<sup>38</sup>

In striking down the Act, the Court held that legislation falls under the Commerce Clause authority only if it regulates (1) the use of channels of interstate commerce,<sup>39</sup> (2) the instrumentalities of interstate commerce,<sup>40</sup> or (3) activities that have a substantial relation to interstate commerce.<sup>41</sup> While the first two categories are bright-line rules, the Court admitted that precedent was unclear as to whether an activity had merely to affect interstate commerce or "substantially affect" it.<sup>42</sup>

The Court devised three tests to determine whether a regulated activity substantially affects interstate commerce.<sup>43</sup> First, the Court looked at whether the regulated activity was commercial or somehow necessary for the continuance of a commercial activity.<sup>44</sup> Second, the Court examined whether the statute required a jurisdictional nexus to interstate commerce.<sup>45</sup> Finally, the Court examined whether Congress made a finding, based on some rational basis (such as empirical data) that there was a connection to interstate commerce.<sup>46</sup>

The first test asks whether the regulated activity is itself a commercial activity or an activity required to carry on a commercial activity.<sup>47</sup> In this category, the Court included such activities as

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37. *Id.* at 551.

38. *Id.*

39. *Lopez*, 514 U.S. at 558 (based on *Caminetti v. United States*, 242 U.S. 470, 491 (1917) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained and is no longer open to question.")).

40. *Id.*

41. *Id.* at 558-59.

42. *Id.* at 559.

43. Lower courts have attempted to clarify the three tests. At least one court's dissent has posited that the test is actually a three-part hierarchy under which the first part must be met before the second and third parts come into play. See *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1995) (Boggs, J., dissenting). However, if an activity complies with the criteria that the regulated activity be commercial or somehow necessary for the continuance of a commercial activity, the second and third parts would be irrelevant. Such an activity already has a basis for constitutional regulation under the commerce power. Surely a jurisdictional nexus or legislative findings of a connection to interstate commerce would be unnecessary to uphold a law that already regulates a commercial activity. Therefore, it is more likely that the three parts explained in *Lopez* are options, any of which could lead to upholding a law as a proper exercise of the commerce power.

44. *Lopez*, 514 U.S. at 561.

45. *Id.*

46. *Id.* at 562-63.

47. *Id.* at 559-60.

intrastate coal mining,<sup>48</sup> intrastate extortion credit transactions (also known as loan sharking),<sup>49</sup> restaurants that use supplies obtained through interstate commerce,<sup>50</sup> inns and motels that cater to interstate guests,<sup>51</sup> and consumption of home-grown wheat that in the aggregate affected the price on the interstate wheat market.<sup>52</sup> However, if an activity was not itself commercial or if its regulation was not necessary to protect interstate commerce, the Court held that to regulate it would be an unconstitutional use of the commerce power.<sup>53</sup>

Under the second test, also known as a jurisdictional nexus test, legislation that does not meet the first test may still be found constitutional. To meet this test, the legislation must specifically require plaintiffs to demonstrate an impact on interstate commerce to be successful.<sup>54</sup> As long as the statute requires this connection to interstate commerce, the Court will uphold such legislation.

The third test requires an examination of an act's legislative history to determine whether Congress explicitly found a connection between the regulated activity and interstate commerce.<sup>55</sup> While the Court acknowledged that Congress is not required to make formal findings of that sort, it said that the lack of such findings could make it impossible for the Court to see a connection to interstate commerce when "no such substantial effect was visible to the naked eye."<sup>56</sup> This dicta implies that even if the Court fails to see the connection, formal findings by Congress could be enough for the Court to validate the use of the commerce power.

In *Lopez*, the government argued that the Gun-Free School Zones Act met the third test despite a lack of formal congressional findings because (1) the cost of medical care for victims of gun-related violence was substantial, and thus interstate commerce was substantially affected in the form of medical insurance; (2) gun-related violence resulted in less interstate travel to areas that were perceived as unsafe because of that violence; and (3) the presence of guns in schools threatened the educational process and resulted in poorly educated citizens who in turn adversely affected interstate commerce.<sup>57</sup>

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

49. See *Perez v. United States*, 406 U.S. 146 (1971).

50. See *Katzenbach v. McClung*, 379 U.S. 294 (1964).

51. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

52. See *Wickard v. Fillburn*, 317 U.S. at 111 (1942).

53. *Lopez*, 514 U.S. at 561.

54. *Id.* at 561-62.

55. *Id.* at 562-63.

56. *Id.*

57. *Id.* at 563-64.



The Court rejected two of the government's arguments. Analyzing the first argument, the Court reasoned that if it was valid Congress could regulate almost anything that might lead to violent crime because of the impact on medical insurance.<sup>58</sup> Analyzing the third argument, the Court held that to link firearm possession in a school zone to a substantial affect on interstate commerce, the Court would have to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."<sup>59</sup>

However, the Court did not discuss the second argument, that gun-related violence in school zones could affect interstate travel to school zones.<sup>60</sup> The Court's reasons for ignoring this point are unknown. Consequently, its failure to address the issue left intact prior rulings holding that an impact on interstate travel was sufficient to make congressional use of the commerce power constitutional.<sup>61</sup>

## 2. The Kennedy-O'Connor Concurrence

While agreeing that the Gun-Free School Zones Act was an impermissible use of the commerce power, Justices Kennedy and O'Connor expressed severe reservations about the Court's power to limit that congressional authority.<sup>62</sup> The opening paragraph of the concurrence amply expresses these reservations:

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era *counsels great restraint* before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its *necessary though limited holding*.<sup>63</sup>

The concurrence agreed that the Supreme Court has the authority to review congressional actions that attempt to alter the federal balance. However, the concurrence stated, "[T]he substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt. . . ."<sup>64</sup> In this statement, the

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58. *Id.* at 564-65.

59. *Id.* at 567.

60. *See id.* at 563-68.

61. *See, e.g.,* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 241 (1964).

62. *Lopez*, 514 U.S. at 568-83.

63. *Id.* at 568 (emphasis added).

64. *Id.* at 579.

concurrence appears to argue that the judicial branch has the power to say what the law is but that decisions based on political reasoning are the province of the legislative branch.<sup>65</sup>

Next, the concurrence notes the concurring justices' reluctance to overturn any commerce power legislation unless either no clear connection to interstate commerce exists or the regulation infringes upon a traditional area of state concern.<sup>66</sup> If in any legislation Congress claims to find a connection to interstate commerce, which it did not in *Lopez*, then the Court would proceed to examine whether the exercise of the commerce power intrudes upon an area traditionally of state concern.<sup>67</sup> By this statement, the concurring justices indicated their general deference to Congress by refusing to critically evaluate the basis for the interstate commerce connection. Instead, the Court should only examine the legislation if it infringes on powers, such as the police power, reserved to the states.

### 3. The Dissent

The primary dissent, authored by Justice Breyer and joined by Justices Ginsburg, Souter, and Stevens, stated that the Court should follow three basic principles when dealing with Commerce Clause cases: (1) Congress has the power to regulate local activities that significantly affect interstate commerce;<sup>68</sup> (2) the Court must consider the cumulative effect of all instances of the regulated conduct, not merely the single case that is brought before it;<sup>69</sup> and (3) the Court must grant deference to Congress when Congress finds a connection between the regulated activity and interstate commerce.<sup>70</sup> Of these principles, the dissent and the majority disagreed only as to the third.

The dissent claimed that the Court must grant deference because "the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy."<sup>71</sup> Therefore, the Court should only review whether Congress could have had a rational basis for finding a connection between an activity and interstate commerce, not whether the Court

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65. See also Tom Stacy, *What's Wrong with Lopez*, 44 U. KAN. L. REV. 243, 258-259 (1996).

66. See *Lopez*, 514 U.S. at 580-83.

67. *Id.* at 580.

68. *Id.* at 615.

69. *Id.* at 616.

70. *Id.* at 616-17.

71. *Id.*

believes that the activity substantially affects interstate commerce.<sup>72</sup> The dissent rejected the majority's emphasis on formal congressional findings to help it determine whether a rational basis existed because "the absence of findings, at most, deprives a statute of the benefit of some extra leeway. This extra deference, in principle, might change the result in a close case."<sup>73</sup>

The dissent relied on numerous studies that empirically documented the connection between violence at school and a significant interference with educational quality.<sup>74</sup> The dissent noted that diminished educational quality reduces the productivity of workers and that, in today's global economy, decreased productivity could hamper commerce with foreign countries.<sup>75</sup> In addition, the diminished quality of education in areas where school violence is a factor may affect where firms conduct interstate commerce because "many firms base their location decisions upon the presence, or absence, of a work force with a basic education."<sup>76</sup>

In conclusion, the dissent stated that the Court should have upheld the Gun-Free School Zones Act: "Upholding this legislation would do no more than simply recognize that Congress had a 'rational basis' for finding a significant connection between guns in or near school, and (through their effect on education) the interstate and foreign commerce they threaten."<sup>77</sup>

#### 4. The Meaning of *Lopez*

The majority of the Court was fractured by the reserved concurrence of two of its five members. Consequently, the meaning of the *Lopez* test is difficult to ascertain. The majority seemed to move from a rational basis test that grants deference to Congress toward a test that requires empirical data to support congressional findings of a substantial affect on interstate commerce.<sup>78</sup> However, the Kennedy-O'Connor concurrence seemed hesitant to use such a test, absent a total lack of connection to interstate commerce or infringement upon a traditional area of state concern.

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72. *Id.* at 617.

73. *Id.*

74. *Id.* at 619.

75. *See id.* at 621-22.

76. *Lopez*, 514 U.S. at 622.

77. *Id.* at 631.

78. *See* Larry E. Gee, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress' Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 191 (1995).

That hesitance may explain the short-lived decision of the three-judge panel in the Fourth Circuit that voted two-to-one to uphold the constitutionality of VAWA in *Brzonkala v. Virginia Polytechnic and State University*.<sup>79</sup> That decision stood for just six weeks, until February 5, 1998 when the Fourth Circuit granted a request to vacate the decision and grant a rehearing *en banc*.<sup>80</sup> Oral arguments on the *en banc* rehearing were held on March 5, 1998, but a decision is still pending.

Although the three-judge panel's initial ruling was vacated, this Comment will examine the rationale of both the majority and dissenting opinions, as each made interesting points in the ongoing debate over the constitutionality of VAWA.

### III. THE PANEL'S VIEW OF VAWA

The panel's majority upheld the constitutionality of VAWA.<sup>81</sup> In doing so, the majority read *Lopez* in the manner that this Comment does: first determining whether Congress had a rational basis to find the connection to interstate commerce and then analyzing whether VAWA usurped state authority. Determining that there was a rational basis for the congressional findings and that VAWA regulates an area that is quintessentially federal, the majority held that VAWA is constitutional.<sup>82</sup> Meanwhile, the panel dissent referred to the majority's opinion as "analytical superficiality" and claimed the majority suffered from a "manifest misreading of the Supreme Court's historically significant *Lopez* decision."<sup>83</sup>

#### A. The Panel Majority's Opinion

The majority began its analysis with Congress's "voluminous findings" that supported the connection between gender-motivated violence and interstate commerce.<sup>84</sup> The majority's favorable impression of the basis upon which Congress enacted VAWA is apparent

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79. 132 F.3d 949 (4th Cir. 1997) *vacated and rehearing granted* (Order Granting Rehearing Feb. 5, 1998 (Case No. 96-1814)). Christy Brzonkala claimed her civil right under VAWA to be free from gender-motivated violence was violated by two male students who allegedly gang-raped her in a campus dormitory. She had met the men less than 30 minutes before the attack. As a result of the attack, Brzonkala withdrew from school and returned to her home state of Minnesota, saying she was afraid to continue her education at the Virginia campus because of the threat of further gender-motivated violence. *Id.* at 953.

80. See Order Granting Rehearing, Feb. 5, 1998 (Case No. 96-1814).

81. *Id.*

82. *Brzonkala*, 132 F.3d at 963-73.

83. *Id.* at 974 (Luttig, J., dissenting).

84. *Id.* at 965.

from the first paragraph in which it discusses the finding of the connection.<sup>85</sup> Terms used by the judges to discuss Congress' formal findings include "numerous and specific findings and a mountain of evidence,"<sup>86</sup> "detailed and extensive,"<sup>87</sup> and "exhaustive and meticulous investigation."<sup>88</sup> After examining some of the numerous findings,<sup>89</sup> the panel majority stated that "Congress made an unequivocal and persuasive finding that violence against women substantially affects interstate commerce."<sup>90</sup> It also noted that, in recent Commerce Clause cases, the Fourth Circuit had relied on less extensive findings to validate congressional action.<sup>91</sup> Therefore, the panel majority had "no hesitation similarly upholding VAWA."<sup>92</sup>

The opinion, however, did not stop at the rational basis test but also discussed whether VAWA invades traditional areas of state concern.<sup>93</sup> First, the panel majority said that VAWA is a civil rights statute, not a criminal statute; therefore, the Act does not usurp the state's traditional power in the criminal justice arena.<sup>94</sup> Second, the panel majority said that federal civil rights have been a "federal responsibility since shortly after the Civil War," making federal civil rights legislation "a quintessential area of federal expertise."<sup>95</sup>

The panel majority found that Congress not only understood its Commerce Clause authority when it enacted VAWA, but it took that enumerated power seriously and acted within its boundaries.<sup>96</sup> Therefore, the majority found that VAWA's civil right to be free from gender-motivated violence was a constitutionally permissible exercise of the commerce power.<sup>97</sup>

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85. *Id.* at 964.

86. *Id.*

87. *Id.* at 966.

88. *Id.* at 967.

89. *Id.* at 965-68.

90. *Id.* at 968.

91. *Id.* at 968-69; *see also* *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997); *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995).

92. *Brzonkala*, 132 F.3d at 968.

93. *Id.* at 970-71.

94. *Id.* at 970.

95. *Id.* at 971.

96. *Id.* at 972-73.

97. *Id.* at 974.

### B. The Panel's Dissenting Opinion

The panel dissent believed that the majority made a fundamental mistake by misreading *Lopez* and conducting only a superficial evaluation of the connection between interstate commerce and gender-motivated violence.<sup>98</sup> In particular, the dissent criticized the majority opinion because it "merely recites several statements from the House and Senate committees . . . and then simply states, without more, that the Act is constitutional."<sup>99</sup> Because the dissent believed that the majority failed to critically analyze the connection, the dissent argued that the majority completely disregarded the *Lopez* requirement that a reviewing court conduct an "independent evaluation" of the connection.<sup>100</sup> The panel dissent argued that Congress's findings are nothing more than a single conclusory statement that there is a connection, a finding that is "functionally no different from a complete absence of express congressional findings."<sup>101</sup> The dissent claimed the majority acted as if *Lopez* had never been decided, and concluded with a prediction that the Supreme Court would not allow such "bold intransigence in the face of the Court's recent [*Lopez*] decision."<sup>102</sup>

The Fourth Circuit is regarded as the most conservative bench in the country.<sup>103</sup> Recognizing that the court's conservative nature could portend an unfavorable result for her client, Brzonkala attorney Eileen Wagner said she treated the oral arguments on rehearing as "a dress rehearsal for our arguments in Washington" in front of the U.S. Supreme Court.<sup>104</sup>

## IV. THE SUPREME COURT'S TREATMENT OF POST-*LOPEZ* CASES

The Supreme Court may decline to hear a challenge to the Fourth Circuit's *Brzonkala* ruling regardless of which party is ultimately successful on rehearing. Since the *Lopez* decision in 1995, the Supreme Court has refused to hear a single Commerce Clause case. The Court

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 976.

102. *Id.* at 977.

103. Jan Vertefeuille, *Appeals Court Scrutinizes Violence Against Women Act*, ROANOKE TIMES & WORLD NEWS, March 4, 1998, at B1, available in 1998 WL 5898473.

104. *Full Appeals Court to Hear Tech Case*, RICHMOND TIMES DISPATCH, Feb. 8, 1998, at C3, available in 1998 WL 2026122.

denied all thirty-five such requests in 1995-96.<sup>105</sup> No such cases were among those heard in the 1996-97 and 1997-98 court dockets. Thus, declining to hear the challenge to VAWA would be consistent with the Court's recent approach to Commerce Clause cases.

Of those thirty-five Commerce Clause cases that the Supreme Court refused to hear in 1995, thirty-four of the appellate court cases upheld the congressional use of the commerce power.<sup>106</sup> Several of those cases involved activities with a connection to interstate commerce that seemed nearly as tenuous as that struck down by the Supreme Court in *Lopez*. For example, in *United States v. Clark*,<sup>107</sup> a law banning distribution of illegal drugs within 1,000 feet of a school mirrors the Gun-Free School Zones Act of *Lopez*.<sup>108</sup> The most significant difference between the two laws was that illegal drugs were banned instead of guns. Yet, the Fifth Circuit upheld the law, and the Supreme Court denied certiorari.<sup>109</sup>

Based on the repeated denials of certiorari on cases in which circuit courts have upheld a statute's constitutionality, the Supreme Court may deny certiorari to Brzonkala's opponents should she prevail in the *en banc* decision. The four *Lopez* dissenters each are unlikely to vote in favor of certiorari on cases in which the appellate court upheld the constitutionality of a statute. Such an appellate court ruling is consistent with the dissenters' belief that courts should grant Congress deference on Commerce Clause cases.<sup>110</sup>

If the Fourth Circuit instead finds VAWA unconstitutional, however, the Court's reaction to a request for certiorari is more difficult to predict.

The *Lopez* dissenters may want to grant certiorari in an effort to limit *Lopez*'s application to future Commerce Clause cases. Although the dissenters have enough votes to grant certiorari, they may nevertheless make a strategic decision not to grant certiorari unless they are certain another justice will join them in limiting *Lopez*'s scope and reinstating VAWA. The dissenters would thus be trying to avoid the risk of a majority that could expand *Lopez*'s application to future Commerce Clause cases.

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105. *The Lopez Watch*, 21 ADMIN. & REG. L. NEWS 4, 4 (1996).

106. See 7-9-96 West's Legal News 6599, 1996 WL 379521.

107. 67 F.3d 1154 (5th Cir. 1995), *cert. denied*, 517 U.S. 1141.

108. Compare the statute at issue in *Clark*, 21 U.S.C. § 860(a) (Supp. 1998), with the Gun-Free School Zones Act of 1990 at issue in *Lopez*, 18 U.S.C. § 922(q) (Supp. 1998).

109. *Clark*, 67 F.3d 1154, *cert. denied*, 517 U.S. 1141.

110. *Lopez*, 514 U.S. at 616-17.

The five justices who made up the *Lopez* majority might also tread carefully on a request for certiorari from either side in *Brzonkala*. Even if four votes were granted for certiorari, Justices Kennedy and O'Connor stated in their *Lopez* concurrence that they were hesitant to expand *Lopez* to other Commerce Clause cases and would wait for an "appropriate juncture" before they would "modify our Commerce Clause jurisprudence."<sup>111</sup> Therefore, the other three majority justices would be wary of granting certiorari if they want *Lopez* to continue to have broad application. Thus, if the four *Lopez* dissenters who want to narrow *Lopez* can persuade Justice Kennedy or Justice O'Connor to join them, *Lopez* could become a mere footnote in Commerce Clause jurisprudence and limited to its facts.

With these caveats in mind, the issue of certiorari for *Brzonkala*, if requested, appears to depend on whether the *Lopez* concurring justices agree that the issue of VAWA's constitutionality comes at such an "appropriate juncture" that the Supreme Court should "modify our Commerce Clause jurisprudence." If they find it does, the question then becomes whether *Lopez* will be narrowed to its facts or expanded to apply to every Commerce Clause case. Now, the issue is whether VAWA comes at such an "appropriate juncture" and should be granted certiorari.

#### V. HOW WILL THE SUPREME COURT RULE IF VAWA IS GRANTED CERTIORARI?

Assuming the Supreme Court does eventually receive a request for certiorari in the *Brzonkala* case and grants it, the Court's application of *Lopez* will determine VAWA's constitutionality. The *Lopez* test asks if the activity being regulated is (1) a channel of interstate commerce, (2) an instrumentality of interstate commerce, or (3) substantially affects interstate commerce.<sup>112</sup> Because gender-motivated violence is neither a channel nor an instrumentality of commerce, VAWA must "substantially affect" interstate commerce to be constitutional.

The three *Lopez* methods to determine if an activity substantially affects interstate commerce will therefore be dispositive.<sup>113</sup> Those methods ask (1) does VAWA regulate a commercial activity?; (2) does VAWA have a jurisdictional nexus that requires gender-motivated violence to substantially affect interstate commerce?; and (3) does

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111. *Id.* at 602.

112. See *supra* notes 39-42 and accompanying text.

113. *Lopez*, 514 U.S. at 602; see also *supra* notes 43-56 and accompanying text.



VAWA have legislative history that demonstrates the connection Congress found between gender-motivated violence and interstate commerce?<sup>114</sup> Because gender motivated violence is not a commercial activity and VAWA contains no jurisdictional nexus, VAWA must contain congressional findings as to the connection to interstate commerce.

A. *The Connection of Gender-Motivated Violence to  
Interstate Commerce*

The Court should uphold VAWA because (1) Congress made specific findings to support its rational basis for the connection to interstate commerce, and (2) the connection is analogous to other connections upheld as constitutional in prior cases involving racially-motivated violence and its impact on interstate travel.

1. Congress Found a Connection in the Statistics of  
Gender Violence

First, after four years of hearings that examined data on the economic impact of rape and domestic violence,<sup>115</sup> Congress provided more than enough information to support its finding of the connection between interstate commerce and gender-motivated violence.<sup>116</sup> Early in the debate, Congress heard testimony that a woman is raped every five minutes but that half of the women who are raped never report it.<sup>117</sup> While the effect on the individual rape victim is traumatic, the harm to the collective psyche of women is often overlooked.<sup>118</sup> Unlike potential victims of other violent crimes, women cannot insulate themselves from the threat of rape because women can do nothing to change the biggest risk factor for rape—being female.<sup>119</sup> Former President George Bush acknowledged the cumulative effect of gender-motivated violence and its connection to interstate commerce when he said, “[W]omen will never have the same opportunities as men if a climate of fear leaves them justifiably . . . reluctant to work late hours for fear of getting out of some parking lot safely.”<sup>120</sup>

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114. See *supra* notes 43-56 and accompanying text.

115. See, e.g., H.R. Rep. No. 103-395, pt. II, at 25-29 (1993), *microformed on Sup. Docs. No. Y1.1/8* (U.S. Gov't Printing Office) [hereinafter H.R. Rep. No. 103-395].

116. See H.R. Rep. No. 103-395, *supra* note 115, at 24-27.

117. *Id.* at 25-26.

118. See Brande Stellings, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C. L. L. REV. 185, 198-200 (1993).

119. *Id.* at 185.

120. *Id.* at 199 (quoting *War on Women Must Stop*, L.A. TIMES, June 27, 1989, at 15).

Testimony from Congress also included the fact that more than four million women are annually battered by husbands or former husbands.<sup>121</sup> In addition to these rape and domestic violence statistics, Congress also heard estimates that such violence costs at least \$3 billion annually, including the costs of criminal prosecutions, medical treatment for victims, and the "lost careers, decreased productivity, foregone educational opportunities, and long-term health costs."<sup>122</sup> As a result of this testimony, Congress concluded:

[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in, interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products; . . .<sup>123</sup>

## 2. Congress Found the Connection in the Discouragement of Interstate Travel

Congress' findings detailed the substantial affect of gender-motivated violence on interstate commerce; yet, Congress also found another method to validate its use of the commerce power to create the VAWA civil right. That method was found in the parallel between race-motivated violence and gender-motivated violence. That connection was detailed in the following passage from the legislative history:

Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims of such violence are reduced to symbols of hatred; they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated.<sup>124</sup>

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121. H.R. Rep. No. 103-395, *supra* note 115.

122. S. Rep. No. 101-545, at 33 (1991), *microformed on* Sup. Docs. No. Y1.1/5 (U.S. Gov't Printing Office) [hereinafter S. Rep. No. 101-545] (emphasis added).

123. H.R. Rep. No. 103-711, pt. IV, at 385 (1994), *microformed on* Sup. Docs. No. Y1.1/8 (U.S. Gov't Printing Office) [hereinafter H.R. Rep. No. 103-711].

124. S. Rep. No. 103-138, at 49 (1991), *microformed on* Sup. Docs. No. Y1.1/5 (U.S. Gov't Printing Office) [hereinafter S. Rep. No. 103-138].

Because the civil right to be free from race-motivated violence parallels the civil right to be free from gender-motivated violence, congressional use of the commerce power to enact such legislation should be identically evaluated.<sup>125</sup> Creation of the civil right to be free from racially-motivated violence was upheld as a constitutional use of the commerce power in *Griffin v. Breckenridge*.<sup>126</sup> The Supreme Court held that Congress had the authority to forbid private actions that violate civil rights because Congress has the power to regulate activities that substantially affect interstate commerce through discouragement of interstate travel.<sup>127</sup> Seven years earlier in the landmark ruling of *Katzenbach v. McClung*, the Supreme Court ruled that racial discrimination in a restaurant discouraged interstate travel and discouraged purchases of food and restaurant supplies, thereby impacting both interstate travel and interstate commerce in restaurant supplies.<sup>128</sup> That same year, the Court held that racial discrimination in lodging also discouraged interstate travel in another landmark decision, *Heart of Atlanta Motel, Inc. v. United States*.<sup>129</sup> In each of these three cases, the majority opinion focused on the discouragement of interstate travel caused by the climate of fear created by racial discrimination, often accompanied by racially-motivated violence.

Because the *Lopez* majority failed to address the government's argument that interstate travel is a basis to find that an activity has a substantial affect on interstate commerce,<sup>130</sup> *Lopez* does not change the precedential value of the aforementioned interstate travel cases. Consequently, if Congress finds the regulated activity will discourage interstate travel, then it substantially affects interstate commerce.

Congress must have found that gender-motivated violence discourages interstate travel if VAWA's civil right is constitutional under the Supreme Court's interstate travel jurisprudence.<sup>131</sup> However, a reviewing court need only examine congressional findings to determine if Congress had a rational basis for making the conclu-

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125. Congress may use the commerce power to enact civil rights legislation when it is acting to guarantee protection of the right of interstate travel. See *Heart of Atlanta Motel*, 379 U.S. 241. When determining whether such legislation is constitutional, the Court need only decide if a rational basis exists to connect the prohibited activity to the discouragement of interstate travel. See *id.*

126. 402 U.S. 88 (1971).

127. *Id.*

128. 379 U.S. 294 (1964).

129. 379 U.S. 241 (1964).

130. See *supra* notes 57-61 and accompanying text.

131. See, e.g., *Katzenbach*, 379 U.S. 294, and *Heart of Atlanta Motel*, 379 U.S. 241.

sion.<sup>132</sup> In *Katzenbach*, the Court examined testimony before Congress, not formal findings, to determine that a rational basis existed for Congress to conclude that race-based discrimination in a restaurant discouraged interstate travel.<sup>133</sup> Accordingly, this Comment will examine testimony before Congress on the issue of discouragement of interstate travel as a rational basis for finding the connection to interstate commerce.

First, Congress was told that high rates of rape and other crimes deter women from taking public transportation.<sup>134</sup> Fear of taking public transportation, whether planes, trains, or buses, could discourage interstate travel. Congress was also told of the high threat of rape on college campuses, as one in seven female college students is likely to be raped before she graduates.<sup>135</sup> When that threat allegedly became reality for college student Christy Brzonkala, the plaintiff in *Brzonkala*, it illustrated how the threat of gender-motivated violence discourages interstate travel.

Brzonkala's claims are detailed in the Fourth Circuit panel's decision.<sup>136</sup> Brzonkala traveled from her home state of in the fall of 1994 Minnesota to attend Virginia Tech.<sup>137</sup> After she was allegedly gang-raped in a university dormitory on September 21, 1994, Brzonkala withdrew from the university and returned to Minnesota.<sup>138</sup> She said the reason she withdrew was, in part, because she feared future gender-motivated attacks similar to the one she suffered.<sup>139</sup> She enrolled in a university located four miles from her parents' home because she could live in safety there while attending college.<sup>140</sup> Her alleged experience illustrates how a woman may be discouraged from interstate travel because of fear of gender-motivated violence.

Fear of rape and violent assault discourage interstate travel by women.<sup>141</sup> Women avoid areas perceived as unsafe.<sup>142</sup> This cli-

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132. *Id.*

133. *Katzenbach*, 379 U.S. at 299.

134. Testimony of Sally Goldfarb, on behalf of the NOW Legal Defense and Education Fund, before the U.S. Senate Judiciary Subcommittee on Civil and Constitutional Rights (Nov. 16, 1993), available in 1993 WL 747510 (F.D.C.H.).

135. *Id.*

136. *Brzonkala*, 132 F.3d at 953-54.

137. *Id.*

138. *Id.*; Nina Bernstein, *Ground-breaking Suit Brings Rape Complaint to Light at College*, MINNEAPOLIS-ST. PAUL STAR TRIB., Feb. 13, 1996, at 5A.

139. *Brzonkala*, 132 F.3d at 955.

140. Bernstein, *supra* note 138, at 5A.

141. Elizabeth M. Schneider, Symposium, *The Violence Against Women Act of 1994: A Promise Waiting to be Fulfilled*, 4 J.L. & POL'Y 371, 431 ("It tells us to keep silent, to stay home

mate of fear is a factor that may make them less likely to visit restaurants or hotels that cater to interstate travelers, as in the interstate travel cases previously mentioned.

The obvious parallel between race-based civil rights and gender-based civil rights may be vulnerable to criticism. Race-based civil rights violations and the resulting impact on interstate commerce were directly connected to businesses engaged in interstate commerce, but VAWA does not require that a plaintiff demonstrate a connection to interstate commerce to prevail in a federal lawsuit. Such criticism is misguided, because the Supreme Court's interstate travel jurisprudence requires a showing of discouragement of interstate travel based on the climate of fear engendered, not a showing that the violence occurred in a business.<sup>143</sup> Similar to race-based violence, gender-based violence also discourages interstate travel based on the climate of fear.

Congress made specific findings of how gender-motivated violence substantially affects interstate commerce. Congress relied on the similar impact on interstate travel, whether the violence was motivated by gender or by race. As a result, the Supreme Court should find that Congress had a rational basis to conclude that creating a civil right to be free from gender-motivated violence was a proper use of the commerce power.

#### *B. VAWA Does not Infringe on Traditional Areas of State Concern*

According to *Lopez*, even though Congress had a rational basis for making the connection to interstate commerce, VAWA must still not intrude into traditional areas of state concern.<sup>144</sup> Unlike the Gun-Free School Zones Act, where the traditional areas of state concern were crime and education, VAWA's civil rights remedy does not infringe on states' rights because (1) federal civil rights by definition are no business of the states, (2) existence of a federal civil right does not prevent states from criminally prosecuting those who assault others based on gender, and (3) existence of a federal civil right does not prevent a victim from seeking state tort remedies, such as assault or intentional infliction of emotional distress.

First, a federal civil right is the province of the federal government. Although several states have created state civil rights,<sup>145</sup> none

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and out of the streets, and to stay out of the public arenas.").

142. *Id.*

143. See *supra* notes 124-29 and accompanying text.

144. See *supra* note 66 and accompanying text.

145. Several states have enacted state civil rights to be free from gender-motivated violence. See, e.g., WASH. REV. CODE § 9A.36.080 (1997) (making it a crime to target a person for

of those state rights are enforceable outside the respective state's boundaries. Only Congress can establish a federal civil right enforceable across the country. Therefore, creation of a federal civil right to be free from gender-motivated violence is not a traditional area of state concern.

Second, while VAWA does not require a criminal prosecution before a civil rights claim may be filed in federal court,<sup>146</sup> VAWA does not stop state and local prosecutors from criminally prosecuting those who commit gender-motivated crimes. If a federal civil rights violation did prohibit state criminal prosecutions, California could not have prosecuted the four Los Angeles police officer accused in the beating of Rodney King.<sup>147</sup> California did prosecute all four officers, although a jury acquitted the officers.<sup>148</sup> The federal government then prosecuted the officers on criminal charges of violating King's federal civil rights and convicted two of the officers.<sup>149</sup> King then filed a federal civil rights lawsuit against the officers.<sup>150</sup> By analogy, if the prospect of a civil suit for violation of King's civil rights had no effect on criminal prosecutions of his alleged assailants, then the prospect of a VAWA claim should have no impact on criminal prosecutions of those who commit gender-motivated violence.

Third, nothing in VAWA requires a victim of gender-motivated violence to resort to the federal courts rather than state courts. Instead, VAWA explicitly declares that federal and state courts have concurrent jurisdiction in these matters.<sup>151</sup> In fact, some scholars believe that the existence of a federal civil right will enhance state tort actions by underlining the seriousness of the offense and communicating the intolerable nature of such violence.<sup>152</sup>

In addition to the above-mentioned reasons why VAWA does not encroach on state sovereignty, VAWA itself explicitly forbids encroachment by the federal courts into state law issues such as

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violence based on gender); CAL. PENAL CODE § 422.6(a) (1998 & West Supp. 1996) (treating gender-based violence as a civil rights violation). Other states with similar statutes include Connecticut, Iowa, Massachusetts, Michigan, New Jersey, and Vermont.

146. 42 U.S.C. § 13981(e)(2) (1994).

147. See John Hurst, *LAPD Rights Panel Urges Firing Powell*, L.A. TIMES, Sept. 24, 1993, at Metro 3, available in 1993 WL 2270474.

148. *Id.*

149. *Id.*

150. *Id.*

151. 42 U.S.C. § 13981(e)(3) (1994).

152. See W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577 (1993).

divorce, alimony, child custody, and property settlements.<sup>153</sup> A VAWA claim may not be used to bootstrap such cases into federal courts through use of supplemental jurisdiction under 28 U.S.C. section 1367.<sup>154</sup>

Congress found a connection between gender-motivated violence and interstate commerce and explained its rationale in formal findings.<sup>155</sup> Creation of a federal right to be free from gender-motivated violence does not infringe on any area of traditional state concern. Therefore, the Court should find VAWA constitutional.

### C. Policy Reasons for Upholding VAWA

In addition to the aforementioned reasons for finding VAWA constitutional, several policy reasons also support VAWA. First, the Court should allow Congress to make political judgments that could have more than one outcome. Second, individuals should have a right not to be victimized simply because of their gender. Third, *stare decisis* in interstate travel cases should not be overlooked.

First, the Court should stay out of congressional decisions that are political judgments.<sup>156</sup> The tension between the judiciary and legislative branches dates back to the formation of the country, as illustrated by the landmark decision in *Marbury v. Madison*.<sup>157</sup> Recently, the Supreme Court has held that "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,' [courts should not] lightly second-guess such legislative judgments. . . ."<sup>158</sup> Of course, that does not mean that the Supreme Court can never question a congressional decision. However, as the *Lopez* Court stated, the Court need only determine whether a rational basis exists to justify congressional action based on Commerce Clause authority.<sup>159</sup> But the Court must be mindful that "every act of Congress is entitled to a 'strong presumption of validity and constitutionality.'"<sup>160</sup>

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153. 42 U.S.C. § 13981(e)(4) (1994); see *supra* notes 93-95 and accompanying text.

154. 42 U.S.C. § 13981(d)(2) (1994).

155. See S. Rep. No. 101-545, *supra* note 122, at 43; see also H.R. Rep. No. 103-711, *supra* note 123, at 385, and S. Rep. No. 103-138, *supra* note 124, at 29.

156. *Lopez*, 514 U.S. at 579. See also *supra* notes 62-65 and accompanying text.

157. 5 U.S. (1 Cranch) 137.

158. *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985)) (citation omitted).

159. *Lopez*, 514 U.S. at 557.

160. *Brzonkala*, 132 F.3d at 964 (quoting *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984)).

Congress made such a political judgment when it enacted VAWA, as it took more than four years of debate before enough support was gathered to ensure passage.<sup>161</sup> Political judgments should remain in the hands of the legislative branch and the judiciary should do no more than determine whether the decisions made by Congress are constitutional. A court should not substitute its judgment for that of Congress. By examining whether a connection to interstate commerce is sufficient, the *Brzonkala* district court held that its judgment was superior to that of Congress.<sup>162</sup> The Supreme Court should avoid making the same mistake.

Second, every person should be free from being victimized simply because that person is a member of a specific class. The Fourteenth Amendment's Equal Protection Clause provides protection to all individuals.<sup>163</sup> However, equal treatment of women on an issue as basic to a democracy as the right to vote was not granted until the Nineteenth Amendment was adopted in 1920.<sup>164</sup>

Congress later prohibited the unequal treatment of women in the workplace when it provided protection from gender-based attacks or discrimination in the workplace under Title VII.<sup>165</sup> VAWA only extends that protection to the times when a woman is not at work, as "current law provides a civil rights remedy for gender crimes committed in the workplace, but not for crimes of violence motivated by gender committed on the street or in the home."<sup>166</sup>

The need for making the policy choice to include gender among the classes deserving of federal protection becomes clear when looking at the statistics Congress examined during the four-year debate over VAWA's passage. Violence is the leading cause of injury among women ages 15-44.<sup>167</sup> At least 21,000 domestic crimes were reported to police each week in 1991, and authorities estimated the true number of such crimes to be triple that figure.<sup>168</sup> More than 2,000 women were raped each week in 1991, and more than 90 women were

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161. The legislative history stretches from 1990, with S. Rep. No. 101-545, *supra* note 122, through its passage in 1994.

162. See *Brzonkala*, 132 F.3d at 949.

163. U.S. CONST. amend. XIV, § 1.

164. The Nineteenth Amendment to the U.S. Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX.

165. Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et seq.* (1994).

166. H.R. Rep. No. 103-711, *supra* note 123, at 385.

167. H.R. Rep. No. 103-395; *supra* note 115, at 25 (citing Surgeon General Antonio Novello, *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3132 (1992)).

168. S. Rep. No. 103-138, *supra* note 124, at 37.



murdered each week, with 90 percent of those women killed by men.<sup>169</sup> Experts estimate that three out of four American women will be victims of violent crimes sometime during their lifetimes.<sup>170</sup> The staggering cost of violence against women is at least \$5 billion to \$10 billion in health care, criminal justice, and other social costs.<sup>171</sup> Viewing these statistics, it should come as no surprise that Congress chose to protect a class of citizens that clearly needs protection.

Third, *stare decisis* provides the Court a reason to grant deference to congressional findings of a connection between interstate commerce and violence motivated by gender. In their *Lopez* concurrence, Justices Kennedy and O'Connor found that *stare decisis* "operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature."<sup>172</sup> The *stare decisis* cases involved here are those dealing with interstate travel.<sup>173</sup> The threat of gender-motivated violence discourages interstate travel, as it did for Christy Brzonkala.<sup>174</sup> Therefore, Congress may use its commerce power to forbid such violence.

VAWA was the result of a political judgment, and the Supreme Court should be hesitant to declare such legislative judgment unconstitutional unless there exists no rational basis to support it. In addition, *stare decisis* based on the interstate travel cases supports upholding VAWA.

## VI. CONCLUSION

In passing VAWA in 1994, Congress met the *Lopez* requirement that it make specific findings of how gender-motivated violence substantially affects interstate commerce, and did so even before the Supreme Court enunciated that requirement in 1995. Congress found both an empirical connection in the loss of worker productivity due to injuries from violence and an interstate travel connection that paralleled race-based civil rights legislation that had been previously upheld as a proper use of the commerce power. As a result, VAWA is constitu-

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169. *Id.* at 38.

170. H.R. Rep. No. 103-395, *supra* note 115, at 25 (citing U.S. Department of Justice, *Report to the Nation on Crime and Justice* 29 (2d ed. 1988)).

171. S. Rep. No. 103-138, *supra* note 124, at 41 (citations omitted).

172. *Lopez*, 514 U.S. at 574.

173. See *supra* notes 124-29 and accompanying text.

174. *Brzonkala*, 132 F.3d at 953-54; Bernstein, *supra* note 138, at 5A. See also *supra* notes 136-43 and accompanying text.

tional and the Supreme Court is likely to deny certiorari in the *Brzonkala* case.

VAWA has the potential to be a powerful tool against gender-motivated violence. The Supreme Court should allow Congress to use its commerce power to give victims of such violence, whether they be women or men, the same right to seek justice in the federal courts as that possessed by victims of race-based violence. A federal civil right to be free from gender-motivated violence is not only fair, but it is constitutional.