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Casenote

*569 ARTICLE I SECTION 8 & SECTION 5 OF THE FOURTEENTH AMENDMENT - COMMERCE AND ENFORCEMENT CLAUSES - CONGRESS LACKS THE AUTHORITY TO ENACT A STATUTE AWARDING A CIVIL REMEDY TO VICTIMS OF GENDER-MOTIVATED CRIMES DUE TO THE LACK OF EFFECT OF SUCH VIOLENCE ON INTERSTATE COMMERCE - UNITED STATES V. MORRISON, 529 U.S. 598 (2000).

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> Violent attacks by men now tops the list of dangers to an American woman's health. Every 15 seconds, a woman is battered, and, every 6 minutes a woman is raped in the United States. Last year, more women were beaten by their husbands than were married. 1990 saw a record number of rapes reported to the police. Our family homicide rate is higher than the total homicide rate for countries like Germany or Denmark . . . Drunk driving, heart attacks, and cancer, not violent attacks by men, are commonly perceived to be the most serious health threats to women. Yet the figures clearly demonstrate that violence puts women at greater risk. [FN1][FN1]

I. INTRODUCTION

The United States Constitution endows each branch of government with separate and distinct powers, limited by the functions of the other branches to prevent any centralization of power and to ensure the federal government's performance of its responsibilities to its citizens. [FN2][FN2] Specifically, Article I, Section 8 of the United States Constitution [FN3][FN3] grants Congress the power to regulate commerce ***570** among the states which pertains to both interstate and intrastate commerce. [FN4][FN4]

The Supreme Court has developed an abundant amount of Commerce Clause jurisprudence over the past two centuries. [FN5][FN5] This congressional grant of authority has fluctuated from a grant of plenary power, to a severely restricted ability to regulate, to a period of expansive judicial deference (including the passage of essential civil rights laws), and most recently, to a surprisingly limited reversal in 1995 to pre-World War II regulation. [FN6][FN6]

The Supreme Court has repeatedly addressed the scope of Congress' commerce power since 1824 when Chief Justice Marshall first interpreted the Commerce Clause as a plenary grant of power. [FN7][FN7] With the recognition of an expanding national economy, Congress began to pass restricting legislation, including two significant Acts in the late 1800's. [FN8][FN8] In 1895, however, the Court prioritized the theory of laissez-faire economics over deference to congressional authority, and ushered in an era of judicially imposed limitations in order to foster the development of the economy pursuant to this ideal. [FN9][FN9] However, the federal government abandoned laissez-faire economics when the New Deal presented a ***571** more successful option for the national economy and, in 1936, the Court returned to its former position of congressional deference in NLRB v. Jones & Laughlin. [FN10][FN10] The Jones & Laughlin decision marked a new era in Commerce Clause jurisprudence in which the Court utilized a standard that permitted regulation if the activity substantially affected interstate commerce. [FN11][FN11] Accordingly, the Court deferred its judgment to Congress' ability to legislate on a rational basis, utilizing the Commerce Clause to legislate against moral wrongs and establish civil rights. [FN12][FN12] However, this well-settled approach to commerce power became a debatable matter once again in Lopez when the Court invalidated a piece of legislation for the first time since 1936, thus narrowing the scope of the Commerce Clause without expressly overruling the previous jurisprudence. [FN13][FN13]

Additionally, the Enforcement Clause of the Fourteenth Amendment offers federal protection to the citizens of the states against discriminatory treatment by the states. [FN14][FN14] While the Enforcement Clause offers Congress an opportunity to ***572** regulate state action, the Court has placed parameters around this power to prevent

encompassing private persons within its scope. [FN15][FN15]

In 1994, Congress incorporated this duty to protect the citizens with its commerce power to legislate as it endeavored to create a federal civil remedy in response to what has been termed "a national tragedy:" violence against women. [FN16][FN16] Congress passed the Violence Against Women Act [FN17][FN17] ("VAWA") after four years of thorough legislative findings [FN18][FN18] concluding that the victimization of women ***573** had become a violation of women's civil rights. [FN19][FN19] To address both the pervasive problem of the violence itself as well as the lack of protection afforded women in various stages of the justice system, the VAWA included a federal civil remedy for gender-motivated crimes. [FN20][FN20] Congress cited both the Commerce Clause and the Enforcement Clause as its authority with which it could enact the statute. [FN21][FN21] ***574** Various district courts have addressed the applicability of VAWA, the majority of which have upheld the statute's constitutionality by relying upon the traditional standard requiring that Congress' action be rational. [FN22][FN22]

Recently, in United States v. Morrison, the United States Supreme Court invalidated the VAWA. [FN23][FN23] The Court found that despite voluminous congressional findings establishing the connection between gender-motivated crimes and the economy, gender-motivated crimes could not be regulated due to a lack of impact on interstate commerce. [FN24][FN24] Specifically, the Court held that the proper framework to analyze a claim of substantial effects upon interstate commerce can be found in United States v. Lopez [FN25][FN25] and that the Act does not involve an economic activity which could justify congressional enforcement. [FN26][FN26] Sections II through IV of this note will demonstrate that this decision has marked a departure from previous deference to congressional authority with regard to well-established Commerce and Enforcement Clause jurisprudence. Section V of this ***575** note will analyze whether the Court has prioritized federalism issues while implicitly subordinating the important precedent which established essential civil rights. Has this shift in priorities endangered the future acquisition or development of further civil rights?

II. STATEMENT OF THE CASE

In United States v. Morrison, the Supreme Court of the United States addressed the issue of whether Congress could enact a federal statute protecting victims of gender-motivated crimes pursuant to its Commerce Clause and Enforcement Clause powers. [FN27][FN27] Specifically, the Court examined whether a gender-motivated crime qualified as an activity that substantially affected interstate commerce, thus falling within Congress' commerce power. [FN28][FN28] Analyzing this question under the recent Lopez decision, the Supreme Court held that gender-motivated violence did not qualify as economic activity and, despite its established effects on interstate commerce, Congress could not regulate these crimes of violence with a civil remedy. [FN29][FN29] Furthermore, the Court also rejected Congress' second justification for establishing a federal civil remedy, that the lack of assured protection and inherent bias against victims of gender-motivated crimes in the states' criminal justice systems necessitated congressional enforcement of the Fourteenth Amendment. [FN30][FN30]

A. THE ROAD TO THE SUPREME COURT

In 1994, petitioner Christy Brzonkala, was repeatedly raped by respondents Antonio Morrison and James Crawford less than an hour after meeting them in her dormitory room at Virginia Polytechnic Institute ("Virginia Tech"). [FN31][FN31] Suffering***576** from severe depression after the rape, Brzonkala sought psychiatric assistance and withdrew from Virginia Tech. [FN32][FN32] Brzonkala filed a complaint pursuant to the university's Sexual Assault Policy in February 1995. [FN33][FN33] The hearing conducted by the Virginia Tech Judicial Committee found Morrison guilty of sexual assault, punishable by two semesters' suspension, and dismissed charges against Crawford due to insufficient evidence. [FN34][FN34] The school granted Morrison's appeal of his punishment, citing the insufficient circulation of the sexual assault policy amongst the student body, and held a second hearing pursuant to the university's Abusive Conduct Policy. [FN35][FN35] The second hearing resulted in the same punishment, however Morrison's offense was reduced from "sexual assault" to "using abusive language." [FN36][FN36] In light of the other cases pursued under the Abusive Conduct Policy, the university's administration set aside Morrison's punishment and he was allowed to return to school for the Fall semester of 1995. [FN37][FN37] In doing so, however, Virginia Tech did not inform Brzonkala of this decision; instead, she learned of Morrison's return from a newspaper and subsequently dropped out of Virginia Tech. [FN38][FN38]

Brzonkala brought an action pursuant to the VAWA against Morrison and Crawford, [FN39][FN39] which the offenders sought to dismiss by arguing the unconstitutionality of the federal civil remedy. [FN40][FN40] The United

States intervened as a petitioner***577** to defend the statute's constitutionality. [FN41][FN41] The District Court for the Western District of Virginia granted defendants' motion to dismiss on the grounds that Congress lacked constitutional authority to enact the federal civil remedy under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment, citing insufficient evidence to support the claim. [FN42][FN42]

On appeal, the Court of Appeals for the Fourth Circuit reversed the district court's decision in a 2-1 ruling, holding that Congress had not exceeded its constitutional authority by enacting the VAWA. [FN43][FN43] The panel utilized the "rational basis" test used by ten other circuits in post-Lopez challenges and noted VAWA's focus upon civil rights, an area of the law well within Congress' constitutional responsibilities. [FN44][FN44] The full court of appeals granted defendants' appeal of the panel decision and agreed to rehear the case en banc, thus vacating the panel's decision. [FN45][FN45] The en banc Court of Appeals for the Fourth Circuit, by a divided vote, affirmed the district court's decision that Congress lacked constitutional authority to enforce VAWA's federal civil remedy. [FN46][FN46]

The United States Supreme Court granted certiorari to consider whether Congress possessed constitutional authority to create a federal civil remedy pursuant to either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment, where the remedy is awarded to victims of gender-motivated violence. [FN47][FN47] The Court affirmed the appellate court's conclusion that Congress may not regulate noneconomic activity relating to interstate commerce under the Commerce Clause, nor could Congress enforce, under the Enforcement Clause, ***578** the civil remedy for a private action provided by the statute. [FN48][FN48] The Supreme Court clarified the application of the holding in U.S. v. Lopez and thereby rid the lower courts of further confusion in the interpretation of the substantial effects doctrine of the Commerce Clause. [FN49][FN49] In a narrow interpretation of the already limiting 1995 Lopez decision, the majority opinion expressed confidence in the test which Lopez set forth, thus further restricting claims for federal protection pursuant to Congress' commerce powers. [FN50][FN50]

B. 42 U.S.C. § 13981: THE VIOLENCE AGAINST WOMEN ACT

In the midst of much controversy, [FN51][FN51] Congress enacted §13981 for three basic reasons: 1) to recognize the growing threat of violence against women facing the nation, 2) to ensure women the civil rights denied to them as a result of this violence in the same manner as the civil rights statutes enacted against racial discrimination, and 3) to remedy the inherent biases present in many state courts depriving women of adequate protection. [FN52][FN52] The VAWA developed over four years of congressional fact-finding in the form of hearings, reports, and the accumulation evidence from victims, members of law enforcement and the judiciary, civil rights and women's rights organizations, law professors, politicians, and states' attorneys general. [FN53][FN53] Congress presumably devoted such a diligent effort to these findings on account of the traditional judicial deference afforded such matters, akin to an appellate de facto review. [FN54][FN54]

***579** Drafting the statute with diligent precision, Congress modeled the civil rights remedy after existing civil rights laws providing federal protection for racial or sexual discrimination. [FN55][FN55] The VAWA established a civil right to be free from gender-motivated violence and the remedy thus provided an opportunity for victims to obtain redress for a violation of their recognized right. [FN56][FN56] Perhaps anticipating a judicial challenge to its authority, Congress cited both the Commerce Clause and the Enforcement Clause as sources of power to address an issue that encompasses both the national economy and a dearth of protection afforded to citizens by the States. [FN57][FN57] Congress further attempted to avert existing opposition [FN58][FN58] by including an exemption of jurisdiction in federal court for various family law claims. [FN59][FN59]

***580** The vast majority of causes of action brought under the VAWA in the district courts resulted in successful outcomes for the victims in opposition to constitutional challenges, all of which utilized the rational basis test for Congress' findings. [FN60][FN60] Prior to the Court's rendering of the Morrison decision, the majority of commentators predicted that VAWA would be found constitutional, pursuant to a Lopez analysis. [FN61][FN61]

III. PRIOR CASE HISTORY: THE EVOLUTION OF THE COMMERCE CLAUSE

With the decision in United States v. Morrison, the substantial effects doctrine, which had been relied upon to support the regulation of numerous activities not explicitly economic in nature, has been disregarded. Hence, it is necessary to examine the cases of the past century which have established this doctrine as a necessity for civil rights development and therefore the Commerce Clause history will focus upon such cases.

One of the broadest interpretations of the Commerce Clause occurred in 1942, when the Supreme Court upheld the Agricultural Adjustment Act. [FN62][FN62] In Wickard v. Filburn, an Ohio farmer had produced more than the necessary ***581** amount of wheat, however did not intend to place the surplus in the market, but rather kept this wheat for domestic consumption. [FN63][FN63]Pursuant to the Agricultural Adjustment Act, Wickard was subject to a penalty for marketing excess crop. [FN64][FN64] Wickard sought a declaratory judgement against the agriculture secretary to enjoin the enforcement of this penalty, claiming that such an application of the statute was unconstitutional. [FN65][FN65] The lower court enjoined the government officials from penalizing Wickard, and the Supreme Court granted certiorari. [FN66][FN66] The Court held that the power to regulate commerce included the ability to regulate any practices which would affect commerce. [FN67][FN67] The Court thereby held that the domestic consumption of wheat, when taken in the aggregate, could feasibly affect the price of wheat and subsequently the market, justifying regulation by Congress. [FN68][FN68] This decision established a precedent of great breadth in congressional regulation for areas of the law which would produce an effect upon interstate commerce, thus creating the foundation for the landmark civil rights decisions which would follow. [FN69][FN69]

The Court chose to make such significant decisions in 1964 as it upheld Title II of the Civil Rights Act, pursuant to the Commerce Clause, in Heart of Atlanta Motel, Inc., v. United States and Katzenbach v. McClung. [FN70][FN70] Both cases involved private establishments, a hotel and a restaurant, respectively, which refused to offer their services on the basis of customers' races. [FN71][FN71] The restaurant and hotel owner each contested the constitutionality of Title II of the Civil Rights Act, as applied pursuant to the Commerce Clause, and the Supreme Court granted certiorari.***582** [FN72][FN72]

Though the Supreme Court upheld Title II in each case, the decisions were based upon different reasoning. The Court in Heart of Atlanta Motel, Inc. disagreed with the hotel owner's argument that the activity was beyond the scope of Congress' power due to its local, intrastate nature. [FN73][FN73] The Court cited the substantial and harmful effects standard established in NLRB v. Jones & Laughlin which disregarded the local character of an activity if interstate commerce had been substantially affected. [FN74][FN74] Hence, the Court held that racial discrimination by hotel owners had a substantial effect upon interstate commerce because such practice discouraged black citizens from interstate travel. [FN75][FN75]

In Katzenbach, the Court instead utilized the reasoning from Wickard v. Filburn, finding that the discrimination displayed by the local restaurant represented the pervasive discrimination throughout the country. [FN76][FN76] Consequently, such discrimination, taken in the aggregate, would effect interstate commerce, thus necessitating regulation by the congressional commerce power. [FN77][FN77]

To fully understand the recent turn in Commerce Clause jurisprudence from this previously broad interpretation, it is necessary to examine the Court's invalidation of the Gun-Free School Zone Act in United States v. Lopez. [FN78][FN78] In Lopez, a Texas student brought a gun to his public high school and was arrested under state law. [FN79][FN79] Subsequently, the state violation was dropped and Lopez was indicted pursuant to the federal statute, the district court denied a motion to dismiss, and Lopez was found guilty of violating the Gun-Free School Zone Act. [FN80][FN80] On appeal, the Court of Appeals for the Fifth Circuit reversed Lopez's conviction***583** giving credence to the defendant's argument that the Gun-Free School Zone Act was not within Congress' power. [FN81] [FN81] The Supreme Court granted certiorari and found a federal statute unconstitutional for the first time in nearly sixty years. [FN82][FN82] Writing for the majority, [FN83][FN83] Chief Justice Rehnquist interpreted the traditional scope of the Commerce Clause as “subject to outer limits” and discussed the past jurisprudence in light of such limitations. [FN84][FN84] The Court held that the regulated activity, possession of a firearm in a school zone, did not substantially affect interstate commerce due to its criminal nature, the lack of a jurisdictional element in the Act's language, the lack of congressional findings establishing the effect on interstate commerce, and the infringement upon state police power by the federal government. [FN85][FN85]

The Court then articulated the three categories of activity within Congress' commerce power: channels of interstate commerce, instrumentalities of or persons traveling within interstate commerce, and those activities substantially affecting interstate commerce. [FN86][FN86] Applying the third category to the Gun-Free School Zone Act, the Court focused upon the criminal nature of the statute in contrast to the economic nature of past applications of the substantial effects doctrine. [FN87][FN87]

The majority then found that the language of the Gun-Free School Zone Act lacked a jurisdictional element

necessary to create a nexus between interstate ***584** commerce and the regulation of guns in schools. [FN88][FN88] The Court also considered the lack of congressional findings to be fatal to the Act's constitutionality, although not explicitly requiring the existence of such data. [FN89][FN89] Finally, the majority rejected the government's attempts to defend the regulation of violence due to its expense to the nation. [FN90][FN90] The Court thus revived the federalism debate and, in so doing, issued an ambiguous opinion which left both scholars and lower courts at a loss as to the future of the Commerce Clause. Was Lopez a mere aberration or the herald of a renaissance of the previous standard of judicial imposition upon congressional authority?

IV. UNITED STATES V. MORRISON: THE SUPREME COURT DENIES THE EFFECTS OF GENDER-MOTIVATEED VIOLENCE ON INTERSTATE COMMERCE AND SETS A HEIGHTENED STANDARD FOR CIVIL RIGHTS PROTECTION UNDER THE COMMERCE & ENFORCEMENT CLAUSES

A. THE MAJORITY OPINION

Writing for the majority, Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, invalidated the VAWA. [FN91][FN91] The Court began the opinion by recognizing the civil right granted by the VAWA's statement that every person within the United States "shall have the right to be free from crimes of violence motivated by gender." [FN92][FN92] The majority then acknowledged***585** that the VAWA created a federal civil remedy for crimes specified by the statute as gender-motivated and went on to note the appropriate limitations which Congress had placed upon a person's ability to bring such a cause of action. [FN93][FN93] The Court examined Congress' proffered sources of authority, the Commerce Clause and the Enforcement Clause, pursuant to the principle that Congress' authority must be limited and defined. [FN94][FN94]

1. THE COMMERCE CLAUSE

The Chief Justice first explained that an act of Congress is invalid if it exceeds the boundaries of Congress' power established by the Constitution. [FN95][FN95] Chief Justice Rehnquist acknowledged the development of Congress' commerce power in conjunction with the development of the nation, but focused the discussion on the limitations Lopez placed on the previously broad interpretation of the commerce power. [FN96][FN96] Chief Justice Renquist then utilized cautionary language from a New Deal era case which greatly expanded Congress' commerce power in order to emphasize the duty of the Court to protect federalist principles by not extending commerce power "so as to embrace effects upon interstate commerce so indirect and remote." [FN97][FN97] The Court next identified the three broad categories which modern commerce clause jurisprudence has regulated and prioritized the third of these categories, concerning those activities substantially affecting interstate commerce. [FN98][FN98]

***586** The majority declared that the Lopez decision offered a viable framework for an analysis of an activity substantially affecting interstate commerce, thus the Court subsequently set forth the "significant considerations" from Lopez as the definitive test. [FN99][FN99]

The Court placed the most emphasis upon the requirement set forth in Lopez that a statute regulate an economic activity, as opposed to the criminal, noneconomic nature of the Gun-Free School Zone Act in Lopez. [FN100][FN100] The Court stressed that, as highlighted in the Lopez decision, the regulation of interstate activities has always been limited to commercial or economic endeavors. [FN101][FN101] The Court identified the next factor in the recently established Lopez test to be the inclusion of a jurisdictional element in the statutory language which connects the activity to the effect on interstate commerce. [FN102][FN102] The Court regarded the next factor, the legislative history of the statute, as less important or merely an evaluative tool for the Court to utilize should the first factor not be readily apparent. [FN103][FN103] Finally, the majority concluded, delineating the list of factors from Lopez with a precaution against attenuated connections. [FN104][FN104]

Having established the analysis utilized in Lopez as a complete and distinct test for the regulation of activities substantively affecting interstate commerce, the Court applied these factors to the VAWA. [FN105][FN105] The majority considered the ***587** application of the first, weightiest prong to yield a clear resolution: a gender-motivated crime is not an economic activity. [FN106][FN106] Furthermore, the Court declined to create a formal criterion for aggregating the effects of noneconomic activity as it asserted that Commerce Clause history did not include

legitimate statutes regulating noneconomic activity. [FN107][FN107] Secondly, the Court found that a lack of a jurisdictional element in the VAWA further jeopardized Congress' attempt to protect victims of gender-motivated crimes because the statute's language did not explicitly connect the regulation of such violence to Congress' commerce power. [FN108][FN108] Thirdly, despite the Court's dismissal of the Gun Free School Zone Act in Lopez on account of a lack of congressional findings to support the legislation, the majority paid no heed to four year's worth of congressional findings supporting the VAWA by establishing a connection between interstate commerce and gender-motivated crimes. [FN109][FN109] The majority rejected the congressional findings as insufficient under its authority to provide the ultimate determination of the effect upon interstate commerce. [FN110][FN110] Finally, the Chief Justice declared that these findings were further weakened by Congress' reliance upon the attenuated reasoning warned against in the fourth prong of the Lopez "test." [FN111][FN111] The majority rejected Congress' reasoning that gender-motivated violence "[deterred] potential victims from traveling interstate." [FN112][FN112] The Court defended this position by issuing further warning that this federal civil remedy will impede upon areas of traditional state regulation such as family law, divorce, and children. [FN113][FN113]

The Chief Justice concluded the majority opinion by further establishing both Congress' lack of ability to regulate noneconomic criminal conduct and the Court's unrelinquished ability to determine "what the law is." [FN114][FN114] The Court then ***588** asserted that congressional regulation over violent crimes amounts to a seizure of the states' police power. [FN115][FN115] The Court thereby declared that the difference between national and local activities must be respected and protected in order to prevent a federal police power. [FN116][FN116]

2. THE ENFORCEMENT CLAUSE

The majority next addressed the alternative argument that Congress' source of authority exists pursuant to the Enforcement Clause of the Fourteenth Amendment. [FN117][FN117] The Court recognized Congress' authority to legislate in areas usually reserved for the States, but noted that this power was limited to prohibiting state action. [FN118][FN118] The majority noted the government's argument that the pervasive bias in the state justice systems was equivalent to state action and conceded that "this assertion is supported by a voluminous congressional record." [FN119][FN119]

However, the Court reasoned that the denial of equal protection of the law could only be an issue with regard to state action, primarily based upon two cases decided in 1883, shortly after the Fourteenth Amendment was passed. [FN120][FN120] The majority rejected the government's first argument that these cases were overruled by more recent decisions, pointing out that the appellant relied upon dicta in the later cases to support its position. [FN121][FN121] The Court's rejection of the government's second argument, however, relied upon a distinction which seemingly created more support for Congress' enactment of the VAWA than a lack ***589** thereof. [FN122][FN122] The Chief Justice drew a parallel between the Congresses that enacted the Civil Rights Acts of 1871 and 1875 with the Congress that enacted the VAWA, in that the purposes of the respective legislatures were to prevent discrimination in the administration of the civil rights laws enacted. [FN123][FN123] The Court maintained that the VAWA's civil remedy could not be justified by the Enforcement Clause because the statute did not endeavor to punish state officials, nor did it apply to only the states in which discrimination had been found. [FN124][FN124] Chief Justice Rehnquist thereby concluded that the remedy for violence which Brzonkala suffered must be provided by the state, not the federal government, in accordance with the principles of federalism. [FN125][FN125]

B. JUSTICE THOMAs' CONCURRENCE

Justice Thomas offered a brief concurrence warning that the Court should expressly overrule the substantial effects test since it presents a danger of limitless action by Congress. [FN126][FN126] Justice Thomas supported the majority's holding, but warned against the continuation of the substantial effects test with regard to the Commerce Clause. [FN127][FN127] Justice Thomas thereby encouraged the Court to provide a more consistent standard to prevent the federal government from seeking to justify its actions according to, in the concurrence's opinion, an overly expansive test. [FN128][FN128] Without further elaboration, Justice Thomas advised a renaissance of the "original understanding" of the Commerce Clause in order to prevent Congress' alleged misappropriation of the states' police power. [FN129][FN129]

***590** C. JUSTICE SOUTER's DISSENT

In a vehement and lengthy dissent, Justice Souter disagreed with both the majority's contention that the past

century of Commerce Clause jurisprudence remained unchanged and the determination that the VAWA exceeded congressional authority pursuant to that clause. [FN130][FN130] The dissent noted that Commerce Clause precedent had established the principle that Congress may legislate with regard to activity having a substantial effect on interstate commerce. [FN131][FN131] Furthermore, Justice Souter contended that the Court should rely upon congressional findings that establish the substantial effect of gender-motivated violence upon interstate commerce and subject the collected evidence merely to a rationality test. [FN132][FN132] The dissent distinguished the vast amount of data assembled over the course of four years to establish the effects of gender-motivated violence upon interstate commerce from the lack of data offered in the Lopez decision. [FN133][FN133] Justice***591** Souter further criticized the Court's dismissal of the congressional findings by observing that the evidence supporting the VAWA far outweighed the record compiled for the cases upholding the Civil Rights Act of 1964. [FN134][FN134] The dissent then reminded the majority of the noneconomic nature of the activity at issue in Wickard v. Filburn and the consequent extension of the commerce power to regulate based on an effect upon the supply and demand of the marketplace. [FN135][FN135] Justice Souter opined that by not ignoring the well-established Commerce Clause ***592** precedent, the Court could very well have found that violence against women affects the supply and demand of the marketplace. [FN136][FN136]

The second ground for disagreement with the majority was the dissent's assertion that the VAWA was indeed within the constitutionally sanctioned scope of Congress' power pursuant to the Commerce Clause. [FN137][FN137] Justice Souter observed that the failure of the majority to pronounce a new standard without the support of precedent resulted in an institutional shift from congressional deference to judicial determination. [FN138][FN138] The dissent questioned the majority's reasoning that enumerated powers prohibit the inclusion of non-enumerated powers, thus creating a substantively selective commerce power analysis. [FN139][FN139]

The dissent asserted that categorical exclusions upon the scope of the commerce power is contrary to the congressional commerce authority supplanted by the necessary and proper clause. [FN140][FN140] Justice Souter commented that the exclusions which the majority placed upon the commerce power revived an old debate of plenary versus categorical limitations. [FN141][FN141] The dissent then contrasted the period of categorical exclusions prior to 1937 with the recognized plenary power from 1937 until the recent Lopez decision. [FN142][FN142]

***593** Justice Souter categorized this decision by the Court as revisiting prior mistakes which "provoked the judicial crisis of 1937" and repeated the conclusion from Wickard that in the wake of the New Deal, judicially contrived distinctions were unnecessary in an economically integrated world. [FN143][FN143]

A third point of the dissent's disagreement with the majority's limitation of congressional authority was that gender-motivated violence was an area for traditional state concern. [FN144][FN144] The dissent noted the rejection of distinct federal and state governments and cited the Founders' ideal that politics rather than judicial review should determine areas of national versus state interest. [FN145][FN145] The Justice reiterated the establishment of the plenary congressional power from Gibbons v. Ogden which included a recognition by Chief Justice Marshall that the proper restraints upon this power were present in the political component of a representative government. [FN146][FN146] Furthermore, the Justice emphasized that the Court had rejected "judicially created limitations" in the 1985 Garcia v. Garcia opinion in light of the reality of a nationally integrated economy. [FN147][FN147]

***594** The dissent's final basis of disagreement with the majority's finding of a lack of congressional authority to enact the VAWA relied upon the States' support for the Act and the subsequent federal ability to act where the States had failed. [FN148][FN148] The dissent included an extensive list of organizations, state officials, and the States themselves which came to the defense of the Act in the current case. [FN149][FN149] Justice Souter thereby concluded that ad hoc review cannot further a distinction between the judicial and legislative powers which has been rejected for the past sixty years, in light of the integrated national commerce which runs contrary to the need for a judicially enforced federalism. [FN150][FN150]

D. JUSTICE BREYER's DISSENT

Justice Breyer, who joined in Justice Souter's dissent in addition to authoring a separate dissent, found the majority's holding to be an illustration of the difficulties in formulating a set of rules by which to assess the Commerce Clause. [FN151][FN151] The Justice outlined the problems which an "economic/noneconomic"

distinction would create in the application of the new standard set forth by the majority. [FN152][FN152] Justice Breyer noted that the Court has complicated its analysis of interstate commerce by requiring need for exceptions despite having validated past activities not entirely economic in nature. [FN153][FN153] Justice Breyer then warned that the new ***595** analysis of the Commerce Clause was underinclusive and will prove troublesome considering the breadth of the categories subject to Congress' commerce power. [FN154][FN154] The Justice reasoned that the majority's concern of an overextension of congressional power cannot be solved by these restrictions because an integrated economy is a reality of our nation. [FN155][FN155]

Having considered the condition of the country's economy as unequivocally dependent upon interstate activity, the Justice reminded the majority that Congress is well-equipped to consider local and national conditions prior to enacting federal legislation. [FN156][FN156] Justice Breyer encouraged the Court to entrust such decisions to Congress as it is institutionally equipped to make such judgements. [FN157][FN157]

Since Justice Breyer affirmed congressional power under the Commerce Clause, the dissent declined from considering the Equal Protection clause argument. [FN158][FN158] However, the Justice briefly reasoned that neither of the cases cited by the majority to reject Congress' reliance upon the Enforcement Clause addressed the government's argument that the VAWA intended to remedy actions of state actors. [FN159][FN159] The Justice questioned the majority's concerns about lack of congruence between a remedy and a violation and, furthermore, chastised the Court's conclusion that inadequate treatment of the violence did not exist in most states. [FN160][FN160] However, the Justice found adequate support for the VAWA pursuant ***596** to the Commerce Clause. [FN161][FN161]

V. CONCLUSION

At the dawn of a new century, the Supreme Court has made a firm statement, but is the United States ready to recognize the end of the development of civil rights in the name of a new federalism? Like all law, the evolution of civil rights and the Commerce Clause which established them has proven to be a creature organic in nature, reflecting the shifting contemporary values of our society. However, with the Morrison decision, the Court has implied that the Commerce Clause will no longer act as a source of protection and by no means is our current lexicon of civil rights absolute and complete.

Analyzing the Court's language itself, the majority opinion contained many flaws which actually support the VAWA's constitutionality. Ironically, the Court cannot escape the quandary into which the majority is place by the discussion of each prong of the Lopez analysis. Pertaining to the economic activity prong, the majority's recitation of caselaw upholding congressional acts that regulated activities substantially affecting interstate commerce includes the petitioner's key cases of establishing the congressional authority to regulate such activities. [FN162][FN162] Yet the Morrison Court has rejected the inclusion of any noneconomic activity even if the effects are substantial and harmful to half the population but hen declines the opportunity to “adopt a categorical rule against aggregating effects of any non-economic activity.” [FN163][FN163] In so doing, the Court has created a new requirement: an activity must be economic in nature; yet the majority does not overrule the Court's past decisions which aggregated the effects of an activity - economic or not.

As to the jurisdictional element requirement, the Morrison decision weakened the Court's stance by stating that “Lopez makes clear that such a jurisdictional element would lend support to the argument that VAWA is sufficiently tied to interstate commerce.” [FN164][FN164] This admission is worth noting because the inclusion of the words “sufficiently tied” completely negates the former argument that the activity***597** must be economic activity and not merely sufficiently tied to such activity, slipping back to the pre-World War II standard the Court rejects in this decision. [FN165][FN165] Similarly, the Court reminds Congress of its clout by summarily rejecting years of thorough findings which the Lopez decision determined to be a possible means of support for a piece of legislation. [FN166][FN166] The Court goes as far as to distinguish Lopez's lack of congressional findings with Morrison's “numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. [FN167][FN167] However, the Court reminds Congress of the lack of significance of such thorough determinations because it is “ultimately a judicial rather than a legislative question and can be settled finally only by this Court.” [FN168][FN168] Thus, the Lopez factor requiring congressional findings to support federal regulation of interstate commerce appears superfluous and not really a part of the Court's analysis if four years of hearings can be dismissed so easily. This analysis falls short of a clear test for determining a statute's viability and appears to be a mere

rationalization of a prior-made decision, namely Lopez.

Furthermore, the future of civil rights suffers as a result of this nominal defense of federalism when, in fact, the Court merely wished to limit Congress' power in favor of its own. The Court has limited congressional authority pursuant to two separate clauses and has minimized the importance of the Legislature's function of accumulating evidence to support proposed statutes. Moreover, federalism appears to be an antiquated argument against the commerce power in an era of an extremely successful, integrated economy in which states are increasingly interdependent. Similarly, the majority of interstate activities involve a legitimate connection to economics. In this case, the Court has shockingly overlooked the inherent commercial nature of a state university and the effects of a college degree or lack thereof. Most significantly, however, the court rejects one of Congress' proffered reasons for the effect of gender-motivated crimes on interstate commerce: that potential victims would be deterred from interstate travel, employment in interstate business or any business transactions involved in interstate commerce. [FN169][FN169] This deterrence argument was heavily relied upon as a rationalization for upholding the Civil Rights Act as Americans suffering discrimination could not travel or participate in interstate commerce on account***598** of amoral and offensive (not illegal or economic) behavior. [FN170][FN170] One would hope that the dismissal of the analogous reasoning from a foundational case in civil rights history would not affect the future of those very civil rights, but in light of the Morrison decision, civil rights appear to be endangered.

With specific regard to women's rights, this decision represents an endorsement of a continued reluctance to extend federal law into the "private sphere" of domestic relations. [FN171][FN171] Hence, this is an outright denial of the developments which feminism has made in the past century to rid society of the public/private distinction between women and men. [FN172][FN172] Furthermore, the determination that gender-motivated violence has no effect on interstate commerce denies the participation of women in the national economy much in the same way that racial discrimination did prior to the Civil Rights Act. Similar to the purpose of gender-motivated violence - to make the victim feel powerless - the Court has rendered victims across the nation of this devastating problem entirely powerless in state courts, which are already mired in bias. [FN173][FN173] Ms. Brzonkala was twice deprived of fair adjudication: at her public university and in the state of Virginia. This decision will prove to exacerbate the already inherent problem of such bias, and most likely will prevent victims from reporting the violence.

Alice S. Vachas, a former prosecutor from Manhattan remarked in her book on sex crimes:

> There is a large, more or less hidden population of what I later came to call collaborators within the criminal justice system. Whether it comes from a police officer or a defense attorney, a judge or a court clerk or a prosecutor, there seems to be a residuum of empathy for rapists that crosses all gender, class, and professional barriers. It gets expressed in different ways, from victim-bashing to jokes in poor taste, and too often it results in giving the rapist a break. [FN174][FN174]

The Court's erroneous conclusion concerning the lack of financial cost which gender-motivated violence has on the national economy misinterpreted the relationship.***599** Furthermore, this misinterpretation misdirects the focus away from a problem which ultimately costs our society an immeasurable amount. The Chief Justice opined that "no civilized system of justice could fail to provide [Ms. Brzonkala] a remedy for the conduct of respondent Morrison," [FN175][FN175] however, the Court had previously conceded that Congress had found insufficient administration of the laws in many states. [FN176][FN176] Has the Chief Justice unintentionally discredited the United States judiciary? It appears that the uncivilized label might apply since the state of Virginia failed to provide a remedy for Ms. Brzonkala and this federal decision invalidating an opportunity for justice serves to perpetuate that failure.

[FN1]. Alexander Dombrowsky, Whether the Constitutionality of the Violence Against Women Act Will Further Federal Protection from Sexual Orientation Crimes, 54 U. Miami L. Rev. 587, 601 (2000) (quoting S. Rep. No. 102-197, at 36 (1991) (footnotes omitted)) (emphasis added).

[FN2]. Marbury v. Madison, 5 U.S. 137, 176 (1803). Chief Justice Marshall established the separation of powers doctrine by holding that "the powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." Id.

[FN3]. The Commerce Clause states "the Congress shall have 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.

[FN4]. NLRB v. Jones & Laughlin, 301 U.S. 1 (1937) (holding that congressional commerce power encompasses

intrastate activities with a close and substantial relationship to interstate commerce).

[FN5]. A brief history of the Court's Commerce Clause jurisprudence is provided in Part III, infra.

[FN6]. See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin, 301 U.S. 1 (1937); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Perez v. United States, 402 U.S. 146 (1971); United States v. Lopez, 514 U.S. 549 (1995).

[FN7]. Christine M. Devey, Commentaries on Mark Tushnet's Taking the Constitution away from the Courts: Casenote: Commerce Clause, Enforcement Clause, or neither? The Constitutionality of the Violence Against Women Act, 34 U. Rich. L. Rev. 567, 569 (2000) (citing Gibbons, 22 U.S. at 189-90). In Gibbons, Chief Justice Marshall defined the congressional authority to regulate commerce as "complete in itself, [able to be] exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." Gibbons, 22 U.S. at 189-90.

[FN8]. Dombrowsky, supra note 1, at 590. Congress enacted the Interstate Commerce Act in 1887, 49 U.S.C.S. § 10101 (Law. Co-op. 1887), followed by the Sherman Anti-Trust Act in 1890, 15 U.S.C.S. § 1 (Law. Co-op. 1890), marking the initial exercise of the commerce power. Id.

[FN9]. Id. (citing United States v. E.C. Knight, Co., 156 U.S. 1 (1895) (holding that manufacturing was distinguishable from commerce and therefore the defendant's operations were beyond the scope of the commerce power)).

[FN10]. Id. at 591 (citing Jones & Laughlin, 301 U.S. 1 (1936)).

[FN11]. Jones & Laughlin, 301 U.S. at 49. In 1942, the Court extended this standard to encompass a non-economic activity which, taken in the aggregate, would substantially affect interstate commerce. Wickard, 317 U.S. at 130-32 (holding that the domestic production of wheat which would not enter interstate commerce could, if taken in the aggregate, substantially affected the wheat market of the entire nation).

[FN12]. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964). In Heart of Atlanta Motel, Inc., the Court held that a motel refusing to offer its services in a racially discriminating manner substantially and harmfully affected interstate commerce. Id. In doing so, the Court upheld Title II of the Civil Rights Act of 1964 to "right a moral wrong." See Katzenbach v. McClung, 379 U.S. 294, 304-05 (1964) (holding that racial discrimination exhibited by a local restaurant represented discriminatory action taken by various establishments across the nation and, without regulation, would substantially affect interstate commerce). The Court also recognized the importance of congressional findings in the determination of whether an activity affected interstate commerce. Perez v. United States, 402 U.S. 146, 156-57 (1971) (holding that local instances of loan sharking reflected the national harm of organized crime and thus affected interstate commerce, justifying regulation by Congress).

[FN13]. United States v. Lopez, 514 U.S. 549, 552 (1995) (holding that the Gun-Free School Zone Act was unconstitutional because the possession of a gun was not sufficiently economic in nature to warrant regulation pursuant to Congress' commerce power).

[FN14]. The Fourteenth Amendment states, in pertinent part, with the Enforcement Clause of section 5 granting Congress the power to enforce the substantive issues of section 1:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United 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 laws.
>
> ...
>
> Section 5: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article this article by appropriate legislation.

U.S. Const. amend. XIV.

[FN15]. See United States v. Harris, 106 U.S. 629 (1882); Civil Rights Cases, 109 U.S. 3 (1883); City of Boerne v.

Flores, 521 U.S. 507 (1997). A further explanation of the Enforcement Clause is provided in Part III, infra.

[FN16]. Johanna R. Shargel, In Defense of the Civil Rights Remedy of the Violence Against Women Act, 106 Yale L.J. 1849, 1850 (1997) (citing Senator Joseph R. Biden, S. Rep. No. 102-197, at 39 (1991) (comments of the Act's chief legislative sponsor)). Prior to the Act's creation, the rate of assaults against women increased at twice the rate as assaults against men; the rate of sexual assault against women increased four times as quickly as the nation's total crime rate. Dombrowsky, supra note 1, at 600 (citing Elizabeth Brown, National Action is Needed to Stop Violence Against Women, Seattle Times, June 6, 1991, at A19.)

[FN17]. 42 U.S.C. § 13981 (1994).

[FN18]. The original text of the VAWA included Congress' summary of its findings, that:

crimes of violence motivated by gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender;... existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce...; a Federal civil rights action as specified in this section 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...

Sally F. Goldfarb, V iolence Against Women and the Persistence of Privacy, 61 Ohio St. L.J. 1, 3 (2000) (citing H.R. Conf. Rep. No. 103-711, at 385 (1994)).

[FN19]. Id. at 7-8. During the debate over the passage of the Act, the civil rights provision remained the most controversial, due in large part, according to some scholars, to the resistance of the government to involve itself in what it has deemed the private sphere, encompassing violence against women. Id. "Violence against women currently poses the most significant threat to women's rights as equal citizens." Shargel, supra note 16, at 1849. Sally Goldfarb, Senior Staff Attorney for the National Organization for Women's Legal Defense and Education Fund, testified before Congress that "because of gender-based violence, American women and girls are relegated to a form of second-class citizenship.... When half of our citizens are not safe at home or on the streets because of their sex, our entire society is diminished." Id. (citing Crimes of Violence Motivated by Gender: Hearings on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong. 7-8 (1993) (statement of Sally Goldfarb, NOW Legal Defense and Education Fund)).

[FN20]. 42 U.S.C. § 13981(b). The civil rights provision of subsection (b) reads: "All persons within the United States shall have the right to be free from crimes of violence motivated by gender [as defined in subsection (d)]." Id. The statute defines the terms used throughout the VAWA in subsection (d), in pertinent part:

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

(2) the term "crime of violence" means - (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses... whether or not those acts have actually resulted in criminal charges, prosecution, or conviction...

42 U.S.C. § 13981(d).

[FN21]. 42 U.S.C. § 13981a. The purpose of the statute as expressed by Congress in part (a) reads:

Pursuant to the affirmative power of a Congress to enact this subtitle 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 subtitle 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.

Id.

[FN22]. Goldfarb, supra note 18, at 59-60. Courts which have upheld the constitutionality of the VAWA's civil remedy pursuant to the Commerce Clause include: Williams v. Board of County Commissioners, No. 98-2485-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999); Kuhn v. Kuhn, No. 98-C-2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 14, 1999); Ericson v. Syracuse Univiversity, 45 F. Supp. 2d 344 (S.D.N.Y. 1999); Culberson v. Doan, 65 F. Supp. 2d 601 (S.D. Ohio 1999); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass. 1999); Doe v. Walker, 193 F.3d 42 (1st Cir. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22305 (D. Kan. July 10, 1998); Timm v. DeLong, 59 F. Supp. 2d 944 (D. Neb. 1998); Mattison v. Click Corp. of America, No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); Crisonino v. N.Y. City Housing Authority, 985 F. Supp. 385 (S.D.N.Y. 1997);

Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996). In contrast, the Courts which have found VAWA unconstitutional are significantly less in number: Brzonkala v. Va. Polytechnic Institute and State University, 935 F. Supp. 779 (W.D. Va. 1996); Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999). Brzonkala has been the only case which has reached the Court of Appeals. Id.

[FN23]. 529 U.S. 598, 682 (2000).

[FN24]. Id. at 676.

[FN25]. 514 U.S. 549 (1995).

[FN26]. Morrison, 529 U.S. at 676.

[FN27]. Id.

[FN28]. Id. at 670.

[FN29]. Id. at 672.

[FN30]. Id. at 682.

[FN31]. Id. Morrison forcibly held Brzonkala on the bed and raped her, after which Crawford followed, mimicking Morrison's assault. Margaret A. Cain, Comment, The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future, 34 Tulsa L.J. 367, 393 (1999) (citing Security on Campus, Inc., Statement of Subject Matter Jurisdiction, Joint Appendix 71, 71-72, at http://www.soconline.org/LEGAL/BRZONKALA/111896.html (last visited Nov. 30, 1997)). Morrison then raped Brzonkala again, during which time he told her that she "had better not have any f***ing diseases." Morrison, 529 U.S. at 666-67 (citing Complaint P22). Following the attack, Morrison made various public announcements about his pleasure in "getting girls drunk and f***ing the s**t out of them." Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 953 (4th Cir. 1997).

[FN32]. Morrison, 529 U.S. at 666-67. Brzonkala's emotional trauma also resulted in a suicide attempt. Cain, supra note 31, at 393.

[FN33]. Morrison, 529 U.S. at 666-67.

[FN34]. Id.

[FN35]. Id.

[FN36]. Id.

[FN37]. Id.

[FN38]. Id.

[FN39]. Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 772 (W.D. Va. 1996)). Brzonkala also sued Virginia Tech pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, which was dismissed for failure to state a claim for which relief can be granted. Id. This note will focus on the Commerce and Enforcement Clause claims.

[FN40]. Id. at 773.

[FN41]. Id.

[FN42]. Id. at 779.

[FN43]. Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997). The panel also affirmed the lower court's dismissal of the Title IX claim for disparate treatment, but reinstated Brzonkala's Title IX hostile environment claim. Id. The panel relied heavily upon the rationale from the successfully executed VAWA claim in Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996). Cain, supra note 31, at 396.

[FN44]. Cain, supra note 31, at 397-98.

[FN45]. Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999).

[FN46]. Id. at 826-27. The en banc court did recognize that Brzonkala was the victim of a gender-motivated crime of violence and thus had sufficiently stated a claim. Id. The court also affirmed the district court's dismissal of Brzonkala's Title IX disparate treatment claim and reversed the lower court's dismissal of Brzonkala's Title IX hostile environment claim, remanding the latter claim. Id.

[FN47]. United States v. Morrison, 529 U.S. 598, 669 (2000).

[FN48]. Id.

[FN49]. Id; s ee generally Sara E. Kropf, The Failure of the United States v. Lopez: Analyzing the Violence Against Women Act, 8 S. Cal. Rev. L. & Women's Stud. 373 (1999).

[FN50]. Morrison, 529 U.S. at 673.

[FN51]. Goldfarb, supra note 18, at 45-58 (discussing the inherent tendency to place a gender dialogue into a public-private sphere and consequently offer less legal protection and involvement for domestic issues, commonly interpreted as “private” and therefore beyond the reach of the law).

[FN52]. Kropf, supra note 49, at 375-76.

[FN53]. Id. at 375; Cain, supra note 31, at 384.

[FN54]. Dombrowsky, supra note 1, at 601 (postulating that the congressional findings would be the strongest post-Lopez defense of VAWA). In a 1997 district court VAWA challenge, Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999), the court warned that “a federal court should pause long and hard before declaring unconstitutional a statutory provision that is the product of such lengthy inquiry and detailed findings by... Congress itself consisting of representatives of the several states.” Devey, supra note 7, at 586-87 (citing Lisa Gelhaus, Constitutional Challenge to VAWA Raises Ire, Trial, June 1999, at 14). But, the Court ultimately overlooked Congress' superior position to collect factual data and, by minimizing the importance of congressional findings in its determination of Morrison, heightened the traditional rational basis standard for such evidence without explicitly overruling it. See Justice Breyer's dissent, infra, text accompanying notes 161-162.

[FN55]. Cain, supra note 31, at 383-84; Kropf, supra note 49, at 378-79.

[FN56]. VAWA, 42 U.S.C. § 13981(b). The language establishing a civil right is provided in VAWA's “right to be free from violence” clause. Id.; see supra note 20 for exact language.

[FN57]. § 13981(a). The source of authority language is provided in VAWA's purpose clause. Id.; see supra note 21 for exact language.

[FN58]. The most notable opposition, and most threatening to the Act's viability, was that of Chief Justice Rehnquist, voicing fear of opening the flood gates of the federal courts for what he termed “a whole host of domestic disputes.” Cain, supra note 31, at 386 (citing 138 Cong. Rec. §443, 444 (1992)). The Chief Justice also expressed these concerns in his Year-End Report. Goldfarb, supra note 18, at 52 (citing William H. Rehnquist, Chief Justice's 1991 Year-End Report on the Federal Judiciary, The Third Branch, Jan. 1992, at 1, 3). Chief Justice Rehnquist further criticized VAWA for the possible “[creation of] needless friction and duplication among the state and federal systems.” Goldfarb, supra note 18, at 52 (citing William H. Rehnquist, Welcoming Remarks: National Conference on State-Federal Judicial Relationships, 78 Va. L. Rev. 1657, 1660 (1992)).

[FN59]. Kropf, supra note 49, at 379. Section 13981(e)(4) reads in pertinent part:

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

42 U.S.C. § 13981(e)(4) (1994).

[FN60]. These district court decisions are listed supra note 22.

[FN61]. Many commentators predicted a positive outcome for VAWA's civil remedy. Kropf, supra note 49, at 411-12 (suggesting that, in addition to the weight due to the congressional findings, the very issues of federalism upon which the Court has focused in recent years could support the validity of the statute); Cain, supra note 31, at 400-04 (arguing that §13981 did not violate the Tenth Amendment, nor did Lopez restrict commerce power, that the congressional findings substantially effected interstate commerce, and that Lopez did not explicitly require a jurisdictional element); Shargel, supra note 16, at 1883 (concluding that Congress acted within both proffered sources of authority and that Lopez created an ambiguous standard by which to establish a new line of jurisprudence). However, others also recognized the difficulties which VAWA's civil remedy faced in a Supreme Court challenge of its constitutionality. Devey, supra note 7, at 587-88 (noting this Court's recent trend towards state autonomy and Chief Justice Rehnquist's public disfavor of the VAWA in his statement that the VAWA is an example of "a series of laws passed by Congress that have expanded the jurisdiction of the federal courts [[raising] the prospect that our system will look more and more like the French government, where even the most minor details are ordained by the national government in Paris"); Dombrosky, supra note 1, at 623-24 (analyzing VAWA under Lopez and predicting that the Court would use Lopez as an outer demarcation of future commerce power challenges).

[FN62]. Wickard v. Filburn, 317 U.S. 111 (1942). The Agricultural Adjustment Act, 7 U.S.C. § 1281 (1938), regulated acreage allotment for crops of wheat and the subsequent production by individual farmers in order to control the volume of wheat moving in interstate commerce and prevent shortages or surpluses. Id.

[FN63]. Id. at 113-14.

[FN64]. Id. at 116-17.

[FN65]. Id.

[FN66]. Id. at 116.

[FN67]. Id. at 128.

[FN68]. Wickard, 317 U.S. at 128.

[FN69]. Id; see also Dombrowsky, supra note 1, at 592.

[FN70]. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). Title II of the Civil Rights Act, 78 Stat. 241 (1964), provided that all persons in the United States are entitled to equal accommodation at establishments if the activities therein affect interstate commerce. Katzenbach, 379 U.S. at 298.

[FN71]. Katzenbach, 379 U.S. at 296-97; Heart of Atlanta Motel, Inc., 379 U.S. at 243-44.

[FN72]. Katzenbach, 379 U.S. at 297; Heart of Atlanta Motel, Inc., 379 U.S. at 244.

[FN73]. Heart of Atlanta Motel, Inc., 379 U.S. at 258.

[FN74]. Id. (citing NLRB v. Jones & Laughlin, 301 U.S. 1 (1936)).

[FN75]. Id. at 261.

[FN76]. Katzenbach, 379 U.S. at 305.

[FN77]. Id. at 300-01.

[FN78]. United States v. Lopez, 514 U.S. 549 (1995). The Gun-Free School Zone Act, 18 U.S.C. § 922(q) (1990), regulated the possession of a firearm within a school zone, pursuant to the commerce power. Id.

[FN79]. Id. at 551.

[FN80]. Lopez was sentenced to six months in prison. Id. at 551-52.

[FN81]. Id. at 552.

[FN82]. Id.

[FN83]. In a 5-4 decision, the Chief Justice was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justices Kennedy and O'Connor issued a concurrence as did Justice Thomas. Id. Justices Souter and Stevens each wrote separate dissents, but joined Justice Breyer's dissent, as did Justice Ginsburg. Id.

[FN84]. Dombrowsky, supra note 1, at 595 (quoting Lopez, 514 U.S. at 556-57). The Court focused on dicta from NLRB v. Jones & Laughlin which stated that the Court should not extend the Commerce Clause to cover remote and indirect effects upon interstate commerce because it would jeopardize the respected dual system of government. Id. at 595-96 (citing Jones & Laughlin, 301 U.S. 1, 37 (1937)).

[FN85]. Lopez, 514 U.S. at 567.

[FN86]. Id. at 558-59.

[FN87]. Id. at 559-61. The Court implicitly rejected the government's argument which relied upon the Wickard standard: the aggregation of an activity substantially affecting interstate commerce, regardless of an economic nature. See id. (citing Wickard v. Filburn, 317 U.S. 111 (1942)).

[FN88]. Id. at 561-62.

[FN89]. Id. The Court did not set a new standard requiring congressional findings to support an act under the commerce power, but seemingly acknowledged that their presence would validate an otherwise unconstitutional statute. Id. Accordingly, the voluminous amount of congressional findings accumulated over the course of four years prior to the enactment of the VAWA would presumably suffice and support its constitutionality. Id. Ironically, however, the Morrison Court interpreted the Lopez analysis as affording congressional findings a mere minor role in the constitutionality of a federal statute, despite the implications in Lopez that the Gun Free School Zone Act would have been valid with the presence of such data. Id.

[FN90]. Id. at 563-64. The Court thus implied a rejection of the reasoning used to support the validation of the Civil Rights Act of 1964 where Congress was lauded for protecting the nation from the moral wrong of racial discrimination. Id. at 567. In this instance, however, the Court warned the federal government against usurping the states' sovereignty to protect citizens' health, welfare, and morality, thus creating a general police power. See id.

[FN91]. Morrison, 529 U.S. at 682.

[FN92]. Id. at 669 (citing 42 U.S.C. §13981(b) (2000)).

[FN93]. Id. Section 13981(d) limits gender-motivated crimes to those “committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender.” 42 U.S.C. § 13981(d)(1). Further limitations provided in the statute by Congress include concurrent jurisdiction for state and federal courts in § 13981(e)(3) and a specific stipulation that the statute shall not create federal jurisdiction over well-established realms of state law such as divorce, alimony, marital property disputes, or matters of child custody. 42 U.S.C. §§

13981(e)(3)-(4).

[FN94]. Morrison, 529 U.S. at 669 (citing Marbury v. Madison, 5 U.S. 137 (1803)).

[FN95]. Id. (citing United States v. Lopez, 514 U.S. 549, 568, 577-78 (1995) (Kennedy, J., concurring); United States v. Harris, 106 U.S. 629, 635 (1882)).

[FN96]. Id. The limitations which the Chief Justice regarded as especially relevant were the scope of the interstate commerce power as applied to the distinction between local and national governments. Id. (citing Lopez, 514 U.S. at 557 (quoting NLRB v. Jones & Laughlin, 301 U.S. 1, 37 (1937)).

[FN97]. Id. (quoting Jones & Laughlin, 301 U.S. at 37).

[FN98]. Id. at 670. The three categories of congressional regulation consist of 1) the use of channels of interstate commerce, 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, including situations in which the threat arises from intrastate activities, and 3) activities having substantial relation to or substantially affecting interstate commerce. Id. (citing Lopez, 514 U.S. at 558). These three areas of permissible regulation represent a culmination of commerce clause jurisprudence formed over the past century. Id. (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964); United States v. Darby, 312 U.S. 100, 114 (1941); S. R.R. Co. v. United States, 222 U.S. 20, 32 (1911); Perez v. United States, 402 U.S. 146, 150 (1971); Jones & Laughlin, 301 U.S. 1, 37).

[FN99]. Id. The Supreme Court in Lopez held that the Gun-Free School Zone Act of 1990 exceeded congressional authority to regulate the possession of a firearm in a school zone due to its effects on interstate commerce. Id. (citing Lopez, 514 U.S. at 551).

[FN100]. Morrison, 529 U.S. at 671 (citing Lopez, 514 U.S. at 551) .

[FN101]. Id. The broad range of activities encompassed the private harvesting of wheat. Id. (citing Wickard v. Filburn, 317 U.S. 111 (1942))

[FN102]. Id. at 672 (citing Lopez, 514 U.S. at 552).

[FN103]. Id.

[FN104]. Id. at 670-71 . The Court outlined the rejected arguments made by the United States in Lopez which included the expenses of violent crime as the result of gun possession and the impeding of the educational process - the “costs of crime” and “national productivity” - as mere “but-for reasoning.” Id. (citing Lopez, 514 U.S. at 563-64).

[FN105]. Id.

[FN106]. Morrison, 529 U.S. at 670-71 . In doing so, the Court in effect heightened the standard from “related to” economic activity or substantially affecting economic activity to being “an” economic activity.

[FN107]. Id.

[FN108]. Id. at 672-73.

[FN109]. Id.

[FN110]. Id. at 673.

[FN111]. Id.

[FN112]. Morrison, 529 U.S. at 673.

[FN113]. Id. The Court defended this position despite the explicit provision in the statute excluding those areas from the VAWA quoted by the majority itself only pages earlier. Id.

[FN114]. Id. at 676-77 (quoting United States v. Nixon, 418 U.S. 683, 703 (1974)).

[FN115]. Id.

[FN116]. Id. at 677.

[FN117]. Id.

[FN118]. Morrison, 529 U.S. at 677 (citing City of Boerne v. Flores, 521 U.S. 507, 520-524 (1997)).

[FN119]. Id. at 677-78. The Court recognized Congress' conclusion that in many state justice systems, the bias against victims of gender-motivated crimes has been perpetuated by insufficient action by law enforcement and court officials during investigation and prosecution of these crimes. Id. (citing H.R. Conf. Rep. No. 103-711, at 385-386 (1994); S. Rep. No. 103-138, at 38, 41-55 (1993); S. Rep. No. 102-197, at 33-35, 41, 43-47 (1991)).

[FN120]. Id. at 678 (citing United States v. Harris, 106 U.S. 629 (1883); Civil Rights Cases 109 U.S. 3 (1883)).

[FN121]. Id. at 679-681 (citing United States v. Guest, 383 U.S. 745 (1966); District of Columbia v. Carter, 409 U.S. 418 (1973)).

[FN122]. Id. at 681-82.

[FN123]. Id. at 681 (citing Cong. Globe, 42nd Cong., 1st Sess. 153 (1871) (statement of Rep. Garfield); Cong. Globe, 42nd Cong., 2d Sess. 430 (1872) (statement of Sen. Sumner)).

[FN124]. Morrison, 529 U.S. at 681-82 (citing Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Ex parte Virginia, 100 U.S. 339 (1880)).

[FN125]. Id. at 682.

[FN126]. Id. (Thomas, J., concurring).

[FN127]. Id. Justice Thomas favored instead the limitation of Congress' powers under the Court's “early Commerce Clause cases” without specifying to which period of commerce clause jurisprudence he was referring. Id.

[FN128]. Id. Justice Thomas described the substantial effects doctrine as a “rootless and malleable standard” with “virtually no limits.” Id.

[FN129]. Id. However, Justice Thomas failed to specify to which period of Commerce Clause jurisprudence he was referring when he stated his preference for the Court's original understanding. Id. Ironically, the earliest interpretation of the commerce clause, the 1824 decision of Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), established a broad interpretation commerce power.

[FN130]. Morrison, 529 U.S. at 683 (Souter, J., dissenting). Justice Souter was joined in the dissenting opinion by Justices Stevens, Ginsburg, and Breyer. Id. The dissent declined to assess the Enforcement Clause claim due to its confidence in the legitimacy of the Commerce Clause as a source of congressional authority. Id.

[FN131]. Id.

[FN132]. Id. Justice Souter reminded the majority that Congress' “institutional capacity for gathering evidence and taking testimony far exceeds [the Court's ability]... [and those] facts support its exercise of the commerce power.” Id.

[FN133]. Id. at 685-86 (Souter, J., dissenting). The dissent noted testimony from various experts and professionals,

victims of such violence, government representatives, and documentary evidence which established the thorough findings supporting the necessity of a civil remedy. Id. Significant findings cited by the dissent included:

"Three out of four American women will be victims of violent crimes sometime during their life." H.R. Rep. No. 103-395, at 25 (1993) (citing U.S. Dept. of Justice Report to the Nation on Crime and Justice 29 (2d ed. 1988)....

"As many as 50 percent of homeless women and children are fleeing domestic violence." S. Rep. No. 101-545, at 37 (1990) (citing E. Schneider, Legal Reform Efforts for Battered Women: Past, Present, and Future (July 1990))....

"Partial estimates show that violent crime against women costs this country at least 3 billion - not million, but billion - dollars a year." S. Rep. No. 101-545, at 33 (citing Schneider, supra, at 4)....

"Estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103-138, at 41 (citing Biden, Domestic Violence: A Crime, Not a Quarrel, Trial 56 (June 1993))....

"Almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." S. Rep. No. 102-197, at 53 (citing Ellis, Atkeson, & Calhoun, An Assessment of Long-Term Reaction to Rape, 90 J. Abnormal Psych., No. 3, at 264 (1981).

Id. at 685-87 (Souter, J., disssenting). Additionally, the dissent cited Congress' explicit finding that:

"crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce... [[,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products..." H.R. Conf. Rep. No. 103-711, at 385 (1994).

Id. at 686 (Souter, J., disssenting).

[FN134]. Id. (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964)). The dissent classified the evidence of the consequences of racial discrimination as "compelling anecdotal reports" and noted a lack of a calculation of aggregate dollars spent as a result of this discrimination in comparison to the extensive evidence of annual costs to the nation due to gender-motivated violence. Id. (citing Civil Rights - Public Accommodations, Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess. App. V, 1383-87 (1963); S. Rep. No. 101-545, at 41, 54 (1990)).

[FN135]. Id. (citing Wickard v. Filburn, 317 U.S. 111,127-29 (1942).

[FN136]. Morrison, 529 U.S. at 688 (Souter, J., dissenting). The Justice suggested that the reduction of women in the work force as a result of gender-motivated violence could substantially decrease the supply and demand of goods in interstate commerce. Id.

[FN137]. Id.

[FN138]. Id. Justice Souter further contrasted the majority's reading of the substantial effects doctrine by noting that the Court has not opted to limit the commerce power, given the opportunity in cases "addressing 'moral and social wrongs." ' Id. (quoting Heart of Atlanta Motel, Inc., 379 U.S. at 257).

[FN139]. Id. at. 689 (Souter, J., dissenting). Furthermore, Justice Souter offered a biting counterargument to the majority's enumerated powers position by citing Hamilton's claim that a truly representative democracy had no need for a Bill of Rights which reserves liberties. Id. (citing The Federalist No. 84 (Alexander Hamilton)).

[FN140]. Id. (citing United States v. Darby, 312 U.S. 100, 118 (1941)).

[FN141]. Id.

[FN142]. Morrison, 529 U.S. at 689 (Souter, J., dissenting). Justice Souter noted that the plenary view of Congress' power included recognition of the fact that a rational basis was necessary for any regulatory scheme, subject to judicial review. Id. (citing Maryland v. Wirtz, 392 U.S. 183, 190 (1968); quoting Katzenbach v. McClung, 379 U.S. 241, 303-04 (1964)). Furthermore, the dissent cited as examples from forty years of precedent in which the Court made fact-oriented qualifications to support the laissez-faire economics of the era as a failure in judicial discernment. Id. (citing United States v. E.C. Knight Co., 156 U.S. 1 (1895); In re Heff, 197 U.S. 488 (1905); The Employers' Liability Cases, 207 U.S. 463 (1908); Adair v. United States, 208 U.S. 161 (1908); Hammer v.

Dagenhart, 247 U.S. 251 (1918); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936)).

[FN143]. Id. at 692-93 (Souter, J., dissenting) (citing Wickard v. Filburn, 317 U.S. 111, 125 (1942)). The Court in Wickard recognized the noneconomic nature of the activity at issue, but stated that "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." Id.

[FN144]. Id.

[FN145]. Id. at 690 (Souter, J., dissenting) (citing Darby, 312 U.S. at 123-24; Hodel v. Indiana, 452 U.S. 314, 330 (1981); Wirtz, 392 U.S. 183 (1968); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976); Garcia v. San Antonio Metro. Auth., 469 U.S. 528 (1985)).

[FN146]. Id. (citing Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 197 (1824)). Chief Justice Marshall emphasized that the restraints upon the commerce power must be political rather than judicial in nature:

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

Id.

[FN147]. Id. at 687 (Souter, J., dissenting) (citing Garcia, 469 U.S. 528(1985)) (affirming Congress' power pursuant to the Commerce Clause to enforce wage and overtime standards for employees of transit systems performing a governmental function).

[FN148]. Morrison, 529 U.S. at 698 (Souter, J., dissenting).

[FN149]. Id. at 698. Among those supporters were the National Association of Attorneys General in which the Attorneys General from thirty-eight states encouraged the civil remedy. Id. Thirty-six states and Puerto Rico filed amicus briefs supporting the petitioner in contrast to one state supporting the respondent's position. Id. The dissent noted the irony that "Antonio Morrison... has 'won the states' rights plea against the states themselves." ' Id. at 699 (Souter, J., dissenting) (citing R. Jackson, The Struggle for Judicial Supremacy 160 (1941)).

[FN150]. Id.

[FN151]. Id. at 700 (Breyer, J., dissenting). Justice Breyer was joined in his dissent by Justice Stevens and Justices Souter and Ginsburg, in part. Id.

[FN152]. Id. The Justice posited that a mugger's activity blurs the line between economic and noneconomic under the majority's analysis, as does loan sharking. Id.

[FN153]. Id. at 700 (Breyer, J., dissenting). The Justice reasoned that in instances where a noneconomic activity has occurred at an economic establishment, regulation has been upheld. (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding regulation against racial discrimination at local motels within congressional authority); Katzenbach v. McClung, 379 U.S. 294 (1964) (holding regulation against racial discrimination at local restaurants within congressional authority)).

[FN154]. Morrison, 529 U.S. at 701 (Breyer, J., dissenting). For example, the Clause is invoked in relation to those activities where there has been an explicit crossing of state lines. Id. Furthermore, the new qualification of an economic activity will include more areas of regulation due to the frequency with which activities involve the crossing of state lines. Id.

[FN155]. Id. at 702 (Breyer, J., dissenting).

[FN156]. Id. Namely, Justice Breyer included the detailed compilation of data accumulated by Congress, the support of the states themselves for the federal regulation, and the legislative process which a statute must undergo prior to enactment. Id. at 704 (Breyer, J., dissenting).

[FN157]. Id. The Justice suggested that the procedural mandates of Congress not only provide a reasonable forum of evaluation, but also take federalism issues into consideration because of the dual nature of the constituencies. Id.

[FN158]. Id. at 704-05 (Breyer, J., dissenting).

[FN159]. Id. at 705 (Breyer, J., dissenting) (citing Civil Rights Cases, 109 U.S. 3, 14 (1883) (establishing that federal laws treated with different standards were those addressing actions of private persons)).

[FN160]. Morrison, 529 U.S. at 705 (Breyer, J., dissenting). The majority appeared to require a showing of a problem in the majority of states despite the documentation of constitutional violations in twenty-one states as revealed in congressional reports. Id.

[FN161]. Id. at 705 (Breyer, J., dissenting).

[FN162]. Id. at 671 (citing Wickard v. Filburn, 317 U.S. 111 (1942); Katzenback v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)).

[FN163]. Id. at 673.

[FN164]. Id. (emphasis added).

[FN165]. Id. at 613.

[FN166]. Morrison, 529 U.S. at 613-14.

[FN167]. Id. (citing H.R. Conf. Rep. No. 103-711, at 385 (1994); S. Rep. No. 103-138, at 40 (1993); S. Rep. No. 101-545, at 33 (1990)).

[FN168]. Id. (citing United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

[FN169]. Id. (citing H.R. Conf. Rep. No. 103-711, at 385).

[FN170]. See generally Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenback v. McClung, 379 U.S. 294 (1964);

[FN171]. See generally Goldfarb, supra note 18.

[FN172]. Id.

[FN173]. United States v. Morrison, 529 U.S. 598, 677 (2000).

[FN174]. Cain, supra note 31, at 375 (quoting Alice S. Vachas, Sex Crimes: Ten Years on the Front Lines Prosecuting Rapists and Confronting their Collaborators 30 (1993)).

[FN175]. Morrison, 529 U.S. at 682.

[FN176]. Id. at 677.