

4-1-2000

Whether the Constitutionality of the Violence Against Women Act Will Further Federal Protection from Sexual Orientation Crimes

Alexander Dombrowsky

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

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 (2000)

Available at: <https://repository.law.miami.edu/umlr/vol54/iss3/5>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENTS

Whether the Constitutionality of the Violence Against Women Act Will Further Federal Protection from Sexual Orientation Crimes

I. INTRODUCTION

On September 21, 1994, two Virginia Polytechnic Institute football players forcibly raped freshman Christy Brzonkala in her dorm room.¹ The first rapist forced Brzonkala onto the bed, face-up, pushed her down by her shoulders, and ripped off her clothes. He used his hands and knees to pin her down and forced her to submit to vaginal intercourse. Brzonkala tried to push him off, but before she could recover, the second attacker raped her. Immediately thereafter, the first man returned and after raping her again, said to Brzonkala, "You better not have any . . . diseases."²

On October 7, 1998, in Laramie, Wyoming, two young men brutally beat an openly-gay college student to death. Mathew Shepard was found the next day, tied spread-eagle to a fence, his skull bludgeoned, yet another victim of an apparent anti-gay hate crime. He survived in a coma for three days before he died. After police officers arrested two men for this beating, one of the suspects claimed that he beat Mathew Shepard because Shepard had made a pass at him.³

The commonality of these two incidents is readily apparent to the lay person, yet our legislature finds these two incidents of violence separate and distinct. This is evident if one compares the protection given to victims of gender-based violence⁴ with protection given to victims of violence based upon sexual orientation.⁵

In 1990, Congress passed the Hate Crime Statistics Act⁶ (the Act).

1. See *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 781 (W.D. Va. 1996).

2. See *id.* at 784.

3. See *Brutal Beating Leaves Gay Student Near Death*, MIAMI HERALD, Oct. 10, 1998, at A10.

4. See generally Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 42 U.S.C.).

5. See generally Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

6. See *id.*

The Act requires that the Department of Justice collect statistics on incidents of hate crimes in America as part of a regular information-gathering system.⁷ The Act encompasses acts of violence based on sexual orientation.⁸ This is merely a statistics-gathering device, rather than true federal protection for gays and lesbians. Federal protection has, however, been afforded to women who are the victims of gender-based violence.⁹ In 1994, Congress used its Commerce Clause authority to enact the Violence Against Women Act¹⁰ (VAWA), which provides victims of gender-based violence with a federal cause of action that includes a civil remedy for damages.¹¹

Nevertheless, the VAWA has been met by severe constitutional criticism. Opponents argue that Congress overstepped its Commerce Clause powers by enacting the VAWA. The opponents have relied on the 1995 Supreme Court case of *United States v. Lopez*¹² to launch a persuasive attack. In *Lopez*, the Supreme Court held that Congress exceeded its Commerce clause authority by enacting the Gun-Free School Zones Act.¹³ Many believe that the *Lopez* Court implicitly rebuked Congress for its enactment of the VAWA. Nevertheless, federal district courts have held almost unanimously that the enactment of the VAWA was a constitutional exercise of Congress' Commerce Clause powers.¹⁴ The question remains whether the Supreme Court will address this issue when it decides *United States v. Morrison*.

The Supreme Court granted certiorari¹⁵ for this case and heard oral arguments this session. This note contends that the Supreme Court will hold the VAWA unconstitutional in light of its holding in *Lopez*. Furthermore, this note maintains that further federal protection for victims of sexual orientation-based violence directly depends upon the constitutionality of the VAWA.

To examine this issue it is necessary to have a background of Commerce Clause jurisprudence. Section I of this article will focus on the history of the Commerce Clause and its interpretation, including a close look at the *Lopez* decision. Section II is dedicated to the history and passage of the VAWA. Section III will focus on two key cases regarding the constitutionality of the VAWA. Section IV will delve into the

7. *See id.*

8. *See id.*

9. *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

10. *See id.*

11. *See* 42 U.S.C. § 13981 (1994).

12. 514 U.S. 549 (1995).

13. *Id.* at 567.

14. *See Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996).

15. *See United States v. Morrison*, 120 S. Ct. 11 (1999).

Hate Crimes Statistics Act. Finally, section V will provide an analysis of the effect the VAWA's constitutionality will have on further protection for victims of sexual orientation-based violence.

I. COMMERCE CLAUSE JURISPRUDENCE

Congress' Commerce Clause power is found in Article I, Section 8, clause 3 of the United States Constitution. It states, "The Congress shall have Power . . . [T]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁶ This apparently elementary clause has generated an ambiguous history of jurisprudence.

1. EARLY COMMERCE CLAUSE CASES

The Supreme Court of the United States first defined the scope of the commerce clause power in the 1824 case of *Gibbons v. Ogden*.¹⁷ In *Gibbons*, an action was instituted calling into question the acts of the legislature of New York that granted exclusive navigation of the waters within the jurisdiction of that state to two men.¹⁸ The plaintiff argued that the state grant interfered with Congress' power to regulate commerce among the several states pursuant to the Commerce Clause.¹⁹ In a ground breaking opinion, Chief Justice Marshall held that the state-granted steamboat monopoly was void because it was in "direct collision" with an act of congress.²⁰ By doing this, Marshall espoused a broad view of "commerce."²¹

Although the *Gibbons* Court interpreted "commerce" broadly, it still struggled with the problem of how far the Commerce Clause power should extend. Marshall wrote that commerce among the states "cannot stop at the external boundary line of each State, but may be introduced into the interior."²² Further, Marshall stated that regulation of intrastate commerce was "inconvenient" and "unnecessary."²³ In addition, he noted that the term "among" remained expansive, but it could be limited to commerce affecting more than one state.²⁴ Therefore, despite the Court's broad definition of commerce, congressional regulation should be limited to interstate commerce and should not encroach upon intrastate commerce. As a result of the Court's broad interpretation of com-

16. U.S. CONST. Art. I, § 8.

17. 22 U.S. (9 Wheat) 1 (1824).

18. *Id.* at 2.

19. *See id.* at 186.

20. *Id.* at 212.

21. *See id.*

22. *Id.* at 194.

23. *Id.*

24. *Id.*

merce, *Gibbons* was a basis for the idea of national economy, and it served to strengthen the national government.

After *Gibbons*, the Supreme Court used the Commerce Clause to check state power and thereby developed its newly established "national economy." At that time, Congress seldomly used its Commerce Clause power to regulate industry. Eventually, Congress began to view the expansion of the national economy and the unrestrained growth of huge corporations as a call for increased regulation.²⁵ As a result, Congress enacted the Interstate Commerce Act of 1887 along with the Sherman Anti-Trust Act of 1890. Both of these acts were based upon the Commerce Clause. Their enactment was Congress' first attempt to use the Commerce Clause to regulate commercial activity.

2. LAISSEZ-FAIRE COMMERCE CASES

After these two acts were passed, the Court became increasingly influenced by laissez-faire economic theories. Laissez-faire economics sought to limit governmental regulation of business and allow freedom of contract for the development of business. The new laissez-faire theory altered the Court's perception of the Commerce Clause from congressional deference to limitation on congressional authority.²⁶

The Court's 1895 holding in *United States v. E.C. Knight, Co.*²⁷ (the Sugar Trust Case) hobbled the Sherman Antitrust Act by distinguishing manufacturing from commerce.²⁸ In *E.C. Knight*, the American Sugar Refining Company had purchased four sugar refineries, thereby gaining ninety-eight percent of all sugar manufacturing capacity in the United States.²⁹ The federal government filed suit against the four refineries and the E.C. Knight company, claiming that the cumulative sales of the businesses constituted a monopoly under the Sherman Antitrust Act.³⁰ The Supreme Court held that E.C. Knight's operations did not result in a monopoly and, thus, was outside the grasp of the Commerce Clause.³¹ In its holding, the Court reasoned that, although the manufacturing would eventually affect commerce, such an effect was only secondary. Therefore, the manufacturing monopoly had only an incidental effect on commerce.³² As a result of *E.C. Knight*, many acts

25. See, e.g., Sherman Anti-Trust Act of 1890, Pub. L. No. 94-435, 90 Stat. 1397 (1976).

26. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that the Court should not fall prey to laissez-faire economic theories in their decision making); see generally *Mugler v. Kansas*, 123 U.S. 623 (1887).

27. 156 U.S. 1 (1895).

28. *Id.* at 12.

29. *Id.* at 2-3.

30. See *id.*

31. *Id.* at 17-18.

32. See *id.* at 12, 17.

of Congress that attempted to regulate industry under the Commerce Clause were invalidated.

3. CONGRESSIONAL DEFERENCE AND THE PENDULUM'S SWING

The effect that laissez-faire economics had upon the Court lasted until 1936. In 1936, the Supreme Court changed its position in *NLRB v. Jones & Laughlin Steel Corp.*³³ This case revolved around the issue of whether Congress could prohibit, under the National Labor Relations Act of 1935, Jones & Laughlin Steel Corporation from engaging in enumerated restricted labor practices.³⁴ The NLRB charged the company with discrimination because they coerced and intimidated its employees.³⁵ The NLRB found the company guilty and ordered them to rehire several employees.³⁶ When it failed to do so, the NLRB petitioned the Circuit Court of Appeals to enforce the order.³⁷ The court refused to enforce the order claiming that Congress had exceeded its Commerce Clause powers when it promulgated the National Labor Act.³⁸

The Supreme Court of the United States surprisingly overruled the District Court of Appeals, holding that Congress was within its authority in enacting the National Labor Relations Act.³⁹ The Court eliminated previous Commerce Clause standards, and it stated that the appropriate standard requires the Court to determine whether a close and substantial relationship exists between the prohibited activity and interstate commerce.⁴⁰ The Court also held that the company's prohibited labor practices did have a substantial effect upon interstate commerce.⁴¹ It reasoned that if Congress could not regulate the prohibited practices, it might result in the shutdown of manufacturing plants, which, in turn, would induce industrial strife.⁴² For these reasons, the Court upheld the National Labor Relations Act as permissive use of Congress' Commerce Clause powers.⁴³ The Jones & Laughlin decision marks the entry into an era where the Court deferred to Congressional authority.

The most extreme decision of this new era of congressional deference is the 1942 case of *Wickard v. Filburn*.⁴⁴ In this case, Filburn, a

33. 301 U.S. 1 (1936).

34. *See id.* at 22.

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *Id.* at 30.

40. *Id.* at 37.

41. *Id.* at 49.

42. *Id.* at 41.

43. *Id.* at 49.

44. 317 U.S. 111 (1942).

farmer in Ohio, brought action against the Secretary of Agriculture of the United States, challenging the constitutionality of the Agriculture Adjustment Act by claiming that it surpassed Congress' Commerce Clause authority.⁴⁵ Congress established the Agriculture Adjustment Act to control the volume of wheat carried within interstate commerce in order to prevent possible surpluses and shortages. The surpluses and shortages would affect the price of wheat, and, in turn, ultimately affect interstate commerce.⁴⁶ The Act allotted a certain percentage of bushels of wheat per acre to grow on the farmer's land, but Filburn grew excess wheat to feed his own livestock.⁴⁷

Despite the fact that Filburn grew the excess wheat solely for his own consumption, the Supreme Court held that Filburn had violated the statute.⁴⁸ The Court reasoned that Filburn's actions would affect the price of wheat, and thereby affect interstate commerce.⁴⁹ The Court explained that the individual consumption by Filburn was going to fulfill a need that "otherwise [would] be reflected by purchases in the open market."⁵⁰ Thus, the Court established the cumulative effects test, which permitted congressional regulation of any activity if the aggregate effects would produce an overall detriment to interstate commerce.⁵¹ As a result of the far-reaching effects of *Wickard v. Filburn*, Congress began to regulate other areas that traditionally had been left to the states, such as crime, the environment, and, most important to our discussion of the VAWA, civil rights.

4. THE CIVIL RIGHTS CASES

In *Heart of Atlanta Motel, Inc. v. United States*,⁵² the Supreme Court upheld Title II of the Civil Rights Act of 1964⁵³ as a permissible extension of Congress' Commerce Clause powers.⁵⁴ In *Heart of Atlanta* the appellant was an owner of a small motel in Atlanta and refused to rent rooms to black people in violation of the Civil Rights Act.⁵⁵ The

45. *See id.* at 114-115.

46. *See id.* at 115.

47. *See id.* at 114.

48. *Id.* at 128-29.

49. *Id.*

50. *Id.* at 128.

51. *Id.*

52. 379 U.S. 241 (1964).

53. Title II of the Civil Rights Act of 1964 provides, in pertinent part: "All persons shall be entitled to full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or nation origin." Pub. L. No. 88-352, 78 Stat. 243 (1964).

54. *Heart of Atlanta*, 379 U.S. at 261.

55. *Id.* at 243.

motel owner challenged the constitutionality of the Civil Rights Act, arguing that Congress' regulation of a single intrastate motel, local in character, was beyond the scope of the Commerce Clause.⁵⁶ The Court disagreed with the motel owner, holding that Congress could properly "prohibit racial discrimination by motels serving travellers, however 'local' their operations may appear."⁵⁷ The Court, following the standard established in *Jones & Laughlin*, focused on whether the activity had a substantial and harmful effect on interstate commerce, not on whether the activity was local in character.⁵⁸ The Court explained that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."⁵⁹ The Court recognized that racial discrimination by innkeepers does indeed effect interstate commerce because it discourages black persons from engaging in interstate travel.⁶⁰

The Court reached a similar result in *Katzenbach v. McClung*.⁶¹ *Katzenbach* involved an owner of a small local barbecue restaurant in Birmingham, Alabama, who refused to sell to black patrons.⁶² The Court, employing the reasoning of *Wickard v. Filburn*,⁶³ found that, although the value of the food purchased solely by the barbecue that traveled in interstate commerce was insignificant, the discriminatory conduct was representative of establishments throughout the country.⁶⁴ As a result, the Court held that, in the aggregate, the conduct of discrimination, if left unchecked, would be likely to have far-reaching harmful effects on commerce.⁶⁵

5. MODERN COMMERCE CLAUSE AND THE ROAD TO *LOPEZ*

Another case that helps our understanding of modern Commerce Clause jurisprudence is the case of *Perez v. United States*.⁶⁶ In *Perez*, the Court upheld Title II of the Consumer Credit Protection Act,⁶⁷ which makes extortionate credit transactions (i.e. "loan sharking") a federal crime.⁶⁸ The case does not fit neatly into the economic activity prong or

56. *See id.* at 243-44.

57. *Id.* at 258.

58. *Id.*

59. *Id.* (quoting *United States v. Women's Sportswear Mfr. Ass'n.*, 336 U.S. 460, 464 (1949)).

60. *Id.* at 261.

61. 379 U.S. 294 (1964).

62. *Id.* at 296-97.

63. 317 U.S. 111 (1942).

64. *Katzenbach*, 379 U.S. at 300-01.

65. *Id.*

66. 402 U.S. 146 (1971).

67. 18 U.S.C. § 891 (1994).

68. *Perez*, 402 U.S. at 156-57.

the jurisdictional limitation prong (later seen in *United States v. Lopez*). Rather, like the civil rights cases, it is better used to determine the extent of deference the Court should grant congressional findings. Perez challenged the Consumer Credit Protection Act based upon the ground that Congress' Commerce Clause authority did not extend to the very local nature of "loan sharking," but the Supreme Court disagreed.⁶⁹ The Court relied heavily upon congressional findings that "loan sharking" was a national concern directly relating to organized crime.⁷⁰ In addition, Congress made findings that organized crime used "loan sharking" to extort millions of dollars from American citizens each year.⁷¹ Thus, the Court held that "[e]ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."⁷²

This overview of Commerce Clause jurisprudence demonstrates that after the nation's period of laissez-faire economics, the Court took a more deferential approach to congressional regulation under the Commerce Clause. After *NRLB v. Jones & Laughlin Steel Corp.* and its progeny, Congress was afforded a broad interpretation of interstate commerce when it is for the "good of the nation." This is most evident in the civil rights cases, where the "good of the nation," an end to racial discrimination, may make the most local of barbecue restaurants subject to a federal regulation.

As will be discussed below, there is a similar policy argument behind the constitutionality of the VAWA. Much like racial discrimination, gender-based violence is a national concern, and it poses a significant stigma on the citizenry. This policy argument remains hidden in both circumstances, oftentimes cloaked in very liberal interpretations of the Commerce Clause. Nevertheless, as the pendulum swung in the direction of congressional deference in *Jones & Laughlin*, so too it may have begun to swing back. Enter the anomaly: *United States v. Lopez*.⁷³

6. *UNITED STATES V. LOPEZ*

On April 26, 1995, the United States Supreme Court issued a landmark decision that rekindled the Commerce Clause debate and seriously jeopardized portions of the VAWA.⁷⁴ In *Lopez*, the Supreme Court invalidated a congressional Commerce Clause act for the first time

69. *See id.*

70. *Id.* at 155-57.

71. *See id.* at 155.

72. *Id.* at 156.

73. 514 U.S. 549 (1995).

74. *See id.*

since 1936.⁷⁵

Alfonso Lopez had been carrying a gun in a San Antonio, Texas, public high school.⁷⁶ Authorities initially arrested the twelfth grade student under a Texas law that prohibited possession of a firearm on public school property. The next day, the state charges were dropped and federal agents charged Lopez with violating the Gun-Free School Zone Act.⁷⁷ After a federal grand jury indicted Lopez for violating the Act, the student moved to dismiss the indictment arguing Congress had no right to exercise federal authority over state schools.⁷⁸ The district court denied the motion, went forward with the bench trial, and found Lopez guilty. The judge sentenced him to six months in prison, followed by two years of supervised release.⁷⁹ Lopez appealed the decision, arguing the Gun-Free School Zones Act exceeded Congress' power under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed with his argument, and, based upon what it deemed as "insufficient congressional findings and legislative history," it reversed Lopez's conviction.⁸⁰ The Supreme Court quickly granted certiorari.

In *Lopez*, the Court surprisingly concluded that the Gun-Free School Zones Act of 1990 exceeded Congress' power under the Commerce Clause.⁸¹ The Court began its review of *Lopez* with a close and careful discussion of Commerce Clause jurisprudence. Chief Justice Rehnquist, writing for the majority, noted that even *Jones & Laughlin*, *Darby*, and *Wickard* confirm that Commerce Clause power "is subject to outer limits."⁸² The majority took an unusual approach to *Jones & Laughlin*, citing the case for the principle that the Commerce Clause power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."⁸³ In accordance with that principle, the Court reiterated the rational basis standard of review for determining whether a regulated activity sufficiently affects

75. See generally *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that Congress exceeded its Commerce Clause authority by enacting the Bituminous Coal Act of 1935).

76. See *Lopez*, 514 U.S. at 551.

77. *Id.*; see generally 18 U.S.C. § 922(q) (1990) (making it "unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone").

78. *Lopez*, 514 U.S. at 551.

79. See *id.* at 551-52.

80. See *id.* at 552.

81. *Id.*

82. *Id.* at 556-57.

83. *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

interstate commerce.⁸⁴

The Court next reviewed the three categories of activity that Congress may permissibly regulate under the Commerce Clause: the channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things traveling within interstate commerce; and activities that have a substantial affect on interstate commerce.⁸⁵ It noted that the Supreme Court precedent that dealt with the terms "substantial" and "affect" from the third category was ambiguous. Nevertheless, the Court explained that the substantial effects standard is the proper test.⁸⁶

The Court determined that the Gun-Free School Zones Act did not fit into either the first or second category but it did find that the Act was part of the third category.⁸⁷ In applying the substantial effect test to the Gun-Free School Zones Act, the Court focused on previous cases in which it had upheld Congress' regulation of intrastate activities that were economic in nature.⁸⁸ The Court noted that the Act in question, by its very nature, was a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."⁸⁹ Furthermore, the Court did not find that the Act was part of some larger legislative scheme to regulate economic activity.⁹⁰ Consequently, the Court determined that the Gun-Free School Zones Act could not be upheld. The Act was not the regulation of an activity that arises out of or is connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.⁹¹

The Supreme Court then proceeded to expose the second flaw of the Act: the lack of a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."⁹² The Court insinuated that a jurisdictional element may very well have rendered the Act constitutional. The jurisdictional nexus would have limited the Act to the regulation of firearms that "have an explicit connection with or effect on interstate commerce."⁹³

The Court next considered the legislative findings with respect to

84. *Id.*

85. *Id.* at 558-59.

86. *Id.* at 559.

87. *Id.*

88. *Id.* at 559-61.

89. *Id.* at 561.

90. *Id.*

91. *See id.* at 561.

92. *Id.*

93. *Id.* at 562.

the Act.⁹⁴ It must be noted that the Court's analysis in this area is of great importance to the question of the constitutionality of the VAWA. The Court agreed that the Congress is not normally required to make formal findings as to the substantial effect a certain activity has upon interstate commerce.⁹⁵ The Court added that "to the extent that congressional findings would enable us to evaluate legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."⁹⁶ In this unexpected turn in Commerce Clause jurisprudence, the Court seemed to implicitly require congressional findings of actual, quantitative substantial effect on interstate commerce. These findings would prove helpful in order to adequately assess the scope of the case-by-case purview of the Congressional Commerce Clause authority. This seemingly inconsequential section in the majority opinion may very well be the most important part of the *Lopez* decision with respect to the VAWA determination. One could reasonably infer that if Congress adequately documents and quantifies the substantial effect on interstate commerce, the Court will uphold such regulation as a permissible exercise of the Commerce Clause authority.

The reader should note the Government's argument regarding the substantial effect possession of a firearm in a school zone would have upon interstate commerce. The Government employed a "cost of crime" argument, apparently trying to revive the "aggregate affects" argument it used in *Wickard* and *Katzenbach*.⁹⁷ The Government argued that possession of guns near schools could result in violent crime. In turn, this could deter interstate travel to areas of the country thought to be dangerous. In addition, this could raise national expenses through insurance costs and damage the educational process by threatening the learning environment resulting in a less productive society.⁹⁸

The Court rejected the "cost of crime" reasoning, noting that adopting such an argument would permit Congress to regulate virtually all activities that lead to violent crime, regardless of their effect on interstate commerce.⁹⁹ The Court also rejected the Government's "national productivity" argument, finding that, if such an argument was accepted, then Congress could regulate any activity that it found was related to the economic productivity of individual citizens, including family law.¹⁰⁰

94. *Id.*

95. *Id.*

96. *Id.* at 563.

97. *Id.* at 563-64.

98. *See id.*

99. *Id.* at 564.

100. *Id.*

The Court went on to claim that if it were to adopt the "national productivity" argument Congress would be empowered to regulate activities traditionally left to the sovereignty of the states.¹⁰¹ The Court stated, "[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."¹⁰²

Finally, the Court concluded its opinion by reiterating that "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."¹⁰³ Further, the Court stated that *Lopez* was "a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce."¹⁰⁴ In order to uphold the Gun-Free School Zones Act, the Court claimed it "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."¹⁰⁵

7. THE AFTERMATH OF *LOPEZ*

The *Lopez* decision has prompted a flood of federal appeals based on Commerce Clause grounds and debate regarding the potential long-term effect that the holding would have on Commerce Clause jurisprudence. Some argue that *Lopez* will result in few changes, and they view the decision an incongruent anomaly.¹⁰⁶ Others believe the decision will spark a return to federalism.¹⁰⁷ Noticing that oral arguments for the case were held on November 8, 1994, the same day Republicans won control of Congress, other observers claim the decision reflects Congress' vow to reduce the federal government.¹⁰⁸ Another legal scholar claims that, at the very least, *Lopez* will result in substantial litigation costs in an effort to figure out what *Lopez* means.¹⁰⁹ Despite the inconclusive debates over the long-term effect, one of the most immediate

101. *Id.*

102. *Id.*

103. *Id.* at 567.

104. *Id.*

105. *Id.*

106. Compare Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 648 (1996), with Stephen M. McJohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 14, (1995).

107. See sources cited *supra* note 106.

108. See generally Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996).

109. Judge Louis H. Pollak, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533, 551 (1995).

results was a call to legislators to examine more closely the ties between legislation and interstate commerce.¹¹⁰

Regardless of *Lopez*'s transformation of Commerce Clause jurisprudence, no additional statutes have been invalidated, and only a handful of cases have been overturned on Commerce Clause grounds.¹¹¹ Nevertheless, there are some notable decisions wherein *Lopez* has been used to overturn holdings on Commerce Clause grounds. In *United States v. Pappadopoulos*,¹¹² the Ninth Circuit overruled a conviction under 18 U.S.C. § 844(i), the federal arson statute.¹¹³ The court found it insufficient that the residence in question received natural gas from an out-of-state source in order to tie it to interstate commerce.¹¹⁴ The court also applied the "traditional realm of the state" test announced in *Lopez*. It concluded, "This is a simple state arson crime. It should have been tried in state court."¹¹⁵

In the Third Circuit case of *United States v. Bishop*,¹¹⁶ the defendant challenged his conviction under 18 U.S.C. § 2119, the federal carjacking statute.¹¹⁷ He argued that under *Lopez*, Congress exceeded its Commerce Clause power in enacting the law. Although the conviction was ultimately affirmed, there was a very strong dissent¹¹⁸ that demonstrated the confusion of the *Lopez* holding. In his dissent, Justice Becker stated that "[he] view[ed] *Lopez* as a beacon that we must follow, and the direction in which the beacon points compels my vote to invalidate the carjacking statute as beyond the broad reach of Congress' Commerce Clause power."¹¹⁹ Justice Becker strongly maintained that non-commercial intrastate crimes, even if they receive national media coverage, are of a strictly local, state concern.¹²⁰ Despite this disagreement over *Lopez*, the Supreme Court of the United States has repeatedly denied certiorari to *Lopez* challenge cases, perhaps indicating its reluctance to further strengthen its limits on Congress' Commerce Clause powers.¹²¹ For instance, the Court is willing to let a Fourth Circuit federal arson conviction stand where the receipt of electricity from an inter-

110. See notes 126-29.

111. See note 109; *United States v. Denalli*, 73 F.3d 328 (11th Cir. 1996).

112. 64 F.3d 522 (9th Cir. 1995).

113. *Id.* at 530.

114. *Id.* at 527.

115. *Id.* at 528.

116. 66 F.3d 569 (3rd Cir. 1995).

117. *Id.* at 571.

118. *Id.* at 590.

119. *Id.* at 591.

120. *Id.*

121. See generally Kathleen Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE WES. RES. L. REV. 801, 833 (1996).

state grid was found to be a sufficient a tie to interstate commerce.¹²² Yet, Justice Scalia said he would grant the petition and "remand the case to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *United States v. Lopez*."¹²³

The *Lopez* decision marks another swing of the pendulum in Commerce Clause jurisprudence. In the four years since its swing, it has been difficult to determine the actual affect it has had upon Commerce Clause cases, as the Supreme Court has been reluctant to answer the question with similarly-held cases. Perhaps the answer will come from a *Lopez* challenge to the Violence Against Women Act. This note maintains that when the Supreme Court reviews *Morrison*, the issue of Congress' Commerce Clause authority to pass the VAWA will not withstand the *Lopez* analysis.

II. HISTORY AND PASSAGE OF THE VAWA

To better understand the constitutional challenges regarding the VAWA and how withstanding those challenges may provide expanded federal protection for sexual orientation it is necessary to know the origins of the VAWA. Violence against women is a growing and pervasive problem in the United States. In 1990, the Federal Bureau of Investigation recorded 100,000 reported cases of rape. This, however, only represents 7% of all rapes.¹²⁴ The number of women battered every year is between three and four million victims, with one million requiring medical attention for their injuries.¹²⁵ Before the Violence Against Women Bill was created, there was an overall increase in violence within the nation, but the rate of assaults against women increased twice as fast as those against men. Furthermore, the rate of sexual assault increased four times faster than the overall crime rate.¹²⁶

1. LEGISLATIVE HISTORY

As a result of these astonishing numbers, several federal legislators attempted to confront the problem. On January 14, 1991, Senator Joseph Biden, Jr. introduced Bill S. 15, the Violence Against Women

122. See *United States v. Ramsey*, 24 F.3d 602 (4th Cir. 1994) cert. denied, 514 U.S. 1103 (1995).

123. *Ramsey v. United States*, 514 U.S. 1103 (1995).

124. See generally Elizabeth Brown, *Legislation Aims to Aid Victims of Rape*, THE CHRISTIAN SCIENCE MONITOR, Apr. 1, 1991, at 9.

125. See Jacqueline Frank, *Spiraling Violence Against Women Prompts Congress to Act*, REUTERS, Dec. 12, 1990.

126. See Brown, *National Action is Needed to Stop Violence Against Women*, SEATTLE TIMES, June 6, 1991, at A19.

Act of 1991, to the U.S. Senate.¹²⁷ On March 20, 1991, Representative Barbara Boxer introduced a similar version of the Act to the House of Representatives.¹²⁸ In the Senate, the Bill was referred to the Senate Judiciary Committee, which held hearings on April 9, 1991. The House of Representatives version of the Bill was referred to five committees: the Judiciary, Public Works and Transportation, Energy and Commerce, Education and Labor, and Interior and Insular Affairs Committees. Hearings regarding the Bill lasted almost four years. These hearings include distinct legislative findings that may very well be the VAWA's strongest post-*Lopez* defense against constitutional challenge. The VAWA's legislative history demonstrates that Congress was very concerned with the extent of gender-based crimes, their effects on the lives of women, and in turn their effect on interstate commerce. In a 1991 report, the Senate concluded as follows:

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.¹²⁹

In addition, the House of Representatives reported the following statistics:

An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence victims are women. About 35% of women visiting hospital emergency rooms are there due to injuries sustained as a result of domestic violence. One study of battered women found that 63 percent of the victims had been beaten while they were pregnant.¹³⁰

The Senate found that gender-based violence has serious consequences on a national level.¹³¹ For example, it discourages women from interstate travel, prevents them from entering the workplace due to fear of violence, and burdens the national healthcare system that provides

127. See S. 15, 102d Cong. (1991).

128. See H.R. 1502, 102d Cong. (1991).

129. S. REP. NO. 102-197, at 36 (1991) (footnotes omitted).

130. H.R. REP. NO. 103-395, at 26 (1993).

131. See S. REP. NO. 102-197, at 53 (1991); see also H.R. REP. NO. 103-711, at 385 (1994) (stating similar facts for the 1994 bill); S. REP. NO. 103-138, at 54 (1993) (stating similar facts for the 1993 bill).

care after the violence.¹³² From these facts, the Senate concluded that gender-based violence and the fear of gender-based violence prevent women from complete participation in the national economy and, thus, affect interstate commerce.¹³³ Furthermore, the Senate found that the "criminal justice system is not providing equal protection of the laws of women, in the classic sense."¹³⁴ The Senate believed that the state criminal justice systems were not providing adequate relief. Women continuously encountered the hurdles of immunity doctrines, local prejudice, unreasonable proof requirements, and the inability or unwillingness to enforce the law.¹³⁵ Thus in 1994, Congress exercised its authority under the Commerce Clause and section five of the Fourteenth Amendment to pass the Violence Against Women Act.¹³⁶

2. STRUCTURE OF THE VAWA

Enacted as part of the 1994 Crime Control Act,¹³⁷ the VAWA provides criminal and civil remedies for crimes of violence motivated by gender. The VAWA includes several criminal provisions for gender motivated violence that clearly incorporate a jurisdictional element for the interstate enforcement of such crimes:

A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who in the course of, or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided.¹³⁸

Because the interstate enforcement provisions of the VAWA are codified in the criminal section of the United States Code, the provision extends to all criminal penalties in the VAWA. The explicit jurisdictional element stated in the criminal section is very likely to withstand a Commerce Clause challenge. The civil rights provision of the VAWA, on the other hand, raises some concerns.

The most interesting, yet controversial aspect of the VAWA is the civil rights provision. According to 42 U.S.C. § 13981, the civil rights section, the purpose of provision is:

132. *See id.*

133. *See* S. REP. NO. 103-138, at 54 (1993); S. Rep. No. 102-197, at 52-53 (1991).

134. S. REP. NO. 102-197, at 53 (1991).

135. *See* S. REP. NO. 102-197, at 44-48.

136. *See generally* Violence Against Women Act of 1994, PUB. L. NO. 103-322, 108 Stat. 1902 (codified in scattered sections of 42 U.S.C.).

137. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

138. 18 U.S.C. § 2261(a)(1) (1994).

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.¹³⁹

Furthermore, the VAWA defines the term "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."¹⁴⁰ In addition, the civil rights part of the VAWA defines "crime of violence" as follows:

[A]n 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 described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and . . . includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.¹⁴¹

It is clear that the VAWA civil rights provision does not contain the explicit "jurisdiction hook" language like the criminal provision. In comparing the two, the criminal provision necessitates that the perpetrator must travel across a state line or enter or leave Indian country in order for the VAWA to apply. There is no comparable provision in the civil rights section. This absence leaves open a critical question regarding the VAWA's constitutionality based on the Commerce Clause jurisprudence. Especially after the 1995 holding in *Lopez*, this issue may be crucial in determining the constitutionality of the VAWA.

III. TWO KEY CASES INVOLVING THE VAWA

As could be predicted, the VAWA's enactment was quickly challenged as having exceeded Congress' Commerce Clause authority.¹⁴² The first two federal district courts to hear these challenges initially

139. 42 U.S.C. § 13981(a) (1994).

140. 42 U.S.C. § 13981(d)(1) (1994).

141. 42 U.S.C. § 13981(d)(2)(a)-(b) (1994).

142. See generally *Doe v. Doe*, 929 F. Supp. 608 (D.Conn. 1996); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996).

reached opposite conclusions. It is helpful to examine both cases in order to gain an understanding for the arguments that can be made for and against the VAWA's Commerce Clause constitutionality. In *Doe v. Doe*,¹⁴³ the court upheld the VAWA, but it did so without recognizing the limits which the recently decided *Lopez* places on Congress' Commerce Clause authority. In contrast, the federal district court in *Brzonkala v. Virginia Polytechnic Institute and State University (Brzonkala I)*¹⁴⁴ held that Congress did not have the authority within the Commerce Clause to enact the VAWA. This note examines both of these key cases.

1. *DOE V. DOE*

The plaintiff in *Doe* alleged that her husband "systematically and continuously inflicted a violent pattern of physical and mental abuse and cruelty upon [her]."¹⁴⁵ Mrs. Doe claimed that the abuse included throwing her to the floor, kicking her, throwing sharp objects and dangerous objects at her, threatening to kill her, and destroying property belonging to her.¹⁴⁶ She also alleged that her husband forced her to be "a 'slave' and perform all manual labor, including maintaining and laying out his clothes for his numerous dates with his many girlfriends and mistresses."¹⁴⁷

The defendant challenged the constitutionality of the VAWA claiming that Congress did not have the authority to regulate an activity that arguably does not affect interstate commerce.¹⁴⁸ Further, he claimed that Congress could not regulate state criminal and family law, as those areas are traditionally left to state control.¹⁴⁹ The court denied his motion to dismiss, and it found him liable under the VAWA.¹⁵⁰ In the opinion, the court addressed the Commerce Clause challenge first.

The *Doe* court employed the rational basis test to evaluate the VAWA under the Commerce Clause. It explained that it would uphold the statute if it found that "a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce" and that "the means chosen by Congress are 'reasonably adapted to the end permitted by the Constitution.'"¹⁵¹ The court greatly deferred to Congress

143. 929 F. Supp. 608 (D. Conn. 1996).

144. 935 F. Supp. 779 (W.D. Va. 1996).

145. *Doe*, 929 F. Supp. at 610.

146. *See id.*

147. *Id.*

148. *See id.*

149. *See id.* at 612.

150. *Id.* at 610.

151. *Id.* at 612 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 262 (1964)).

by finding that a rational basis did exist.

The court noted that:

In considering whether a comprehensive federal approach was needed to address systematic, gender-based violent crime, Congress held numerous hearings over a four-year period and amassed substantial documentation on how gender-based violence impacts interstate commerce and interferes with women's ability to enjoy equal protection of the laws. Congressional committees heard testimony from law enforcement officials, anti-domestic violence organizations, rape crisis centers, psychiatrists, other mental health experts, physicians, law professors, staff attorneys from legal advocacy groups, state Attorneys General, and victims of domestic violence. Congress also reviewed U.S. Justice Department statistics and studies of gender bias in state courts commissioned by seventeen state supreme courts.¹⁵²

Furthermore, the court went into great detail regarding the Congressional findings used in VAWA enactment, actually citing a "laundry list" of statistics.¹⁵³ According to the *Doe* court, the VAWA findings, unlike those in *Lopez*, were based on actual evidence rather than "theoretical impact arguments."¹⁵⁴ This data proved to the court that domestic violence does substantially affect interstate commerce without "piling inference upon inference."¹⁵⁵ The court concluded that "[t]he Congressional findings and reports qualitatively and quantitatively demonstrate the substantial effect on interstate commerce of gender-based violence, in marked distinction to the Gun Free School Zones Act challenged in *Lopez* which lacked such analysis, only theoretical impact arguments."¹⁵⁶

Notably, the *Doe* court also compared the VAWA to the Agricultural Adjustment Act upheld in *Wickard v. Filburn*.¹⁵⁷ The court also noted that Congress' findings demonstrated that gender-based violence has a "repetitive nationwide impact on" on women's participation in the marketplace.¹⁵⁸ The court implied that this nationwide impact is similar to the "aggregate affects" homegrown wheat would have on the national economy as seen in *Wickard*.¹⁵⁹

While the *Doe* court recognized many portions of *Lopez*, it also ignored certain aspects. The court purported to focus its Commerce Clause challenge around *Lopez*, but it claimed that "*Lopez* did not over-

152. *Id.* at 611.

153. *Id.*

154. *Id.* at 613.

155. See *United States v. Lopez*, 514 U.S. 549, 567 (1995).

156. *Doe*, 929 F. Supp. at 613.

157. 317 U.S. 111 (1942).

158. *Doe*, 929 F. Supp. at 613-14.

159. *Id.*

turn or limit the rationality test.”¹⁶⁰ In so doing, the court ignored the economic activity and jurisdiction limitation aspects of the *Lopez* holding and declared the federalism language dicta.¹⁶¹ Nevertheless, the court chose to focus solely on the Congressional findings aspect of the holding. According to the *Doe* court, rather than limiting the scope of congressional authority under the Commerce Clause, *Lopez* merely adds the element of Congressional findings to the rational basis test.¹⁶²

This interpretation of *Lopez* seems inaccurate because *Lopez* clearly limits the scope of Congress’ Commerce Clause authority and markedly changes the test for Commerce Clause constitutionality. The *Doe* court seems to merely fit its case into just one facet of the *Lopez* framework, namely the Congressional findings aspect (arguably a less significant portion). Yet, this appears to be the way in which similar VAWA challenges are being rebutted. What could reasonably be viewed as a minor holding (some may argue even dicta) in the *Lopez* decision, seems to be the one aspect of the case that repeatedly defends the VAWA from challenge.¹⁶³

2. *BRZONKALA V. VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY*

In the initial decision of *Brzonkala I*, the Western District of Virginia ruled in favor of the defendant and held that, in light of *Lopez*, the VAWA was not within Congress’ Commerce Clause authority.¹⁶⁴ Subsequently the plaintiff appealed, and the Fourth Circuit Court of Appeals, in *Brzonkala II*, voted two-to-one to uphold the constitutionality of the VAWA.¹⁶⁵ That decision, however, only lasted for six weeks, when the Fourth Circuit granted a request to vacate the decision and granted a rehearing *en banc* (*Brzonkala III*).¹⁶⁶ The oral arguments for that hearing *en banc* were held on March 3, 1998. On March 5, 1999, the Fourth Circuit Court of Appeals, in an *en banc* decision, held the VAWA to be an unconstitutional exercise of Congress’ Commerce Clause power.¹⁶⁷

One must analyze the other side of the *Lopez* argument, the side contrary to the *Doe* holding, in order to gain an understanding of an

160. *Id.* at 613.

161. *Id.*

162. *Id.* at 612.

163. *Id.*

164. See generally *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996).

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

166. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820 (4th Cir. 1999).

167. *Id.* at 826.

alternative interpretation of *Lopez*. Additionally, although the initial Fourth Circuit Court of Appeals panel decision has been vacated, it will provide us with helpful counter arguments to *Brzonkala I* and may shed some light onto whether the VAWA will survive constitutional challenge.

a. The Facts

Christy Brzonkala is an adult woman who attended Virginia Polytechnic and State University.¹⁶⁸ On the night of September 21, 1994, leading into the morning of the next day, Brzonkala was raped in her third floor dormitory by two university football players she and her roommate met half an hour before.¹⁶⁹

Initially, Brzonkala and her roommate, Hope Handley, along with the two football players Antonio Morrison and James Crawford, were present in the dorm room. Handley and Crawford left the room after fifteen minutes of conversation.¹⁷⁰ Subsequently Morrison requested intercourse with Brzonkala, who audibly responded “no” twice and attempted to leave. Morrison forced her onto the bed, face-up, pushed her down by her shoulders and forcibly took off her clothes.¹⁷¹ He used his hands to pin her down by the elbows, pressed his knees against her legs, and forced her to submit to vaginal intercourse.¹⁷² Brzonkala attempted to push Morrison off, but, before she could recover, Crawford returned, switched places with Morrison, and raped her in a similar manner.¹⁷³ Crawford then exchanged places with Morrison who raped Brzonkala again. Neither Morrison nor Crawford used a condom.¹⁷⁴

After raping her a second time, Morrison warned Brzonkala, “You better not have any [f—ing] diseases.”¹⁷⁵ Several weeks later, Morrison announced publicly in the dormitory cafeteria, and in the presence of at least one female student, “I like to get girls drunk and [f—] the [sh—] out of them.”¹⁷⁶

In April of 1995, Brzonkala filed a formal complaint with the University under its sexual assault policy.¹⁷⁷ A judicial committee, in a hearing held by the University, found Morrison guilty of sexual assault

168. *Brzonkala I*, 935 F. Supp. at 781.

169. *See id.* at 781-82.

170. *See id.* at 782.

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.*

and suspended him for two semesters. The evidence against Crawford was found to be insufficient to take action.¹⁷⁸ After a second hearing and a subsequent appeal, the University lifted Morrison's suspension, enabling him to return to classes in the fall of 1995. The University failed to inform Brzonkala of his impending return, and she only found out about it later through a newspaper article.¹⁷⁹ Brzonkala canceled her plans to return to the University amidst fear for her personal safety and choose instead to live with her parents and attend a college closer to home.¹⁸⁰

In March of 1996, Brzonkala filed a complaint with the United States District Court for the Western District of Virginia, alleging violations of Title IX of the Education Amendment Act,¹⁸¹ violation of Title III of the VAWA,¹⁸² and several state law claims. This action was brought against the University, William Landside, Comptroller of the Commonwealth, and three University football players (Antonio Morrison, James Crawford, and Cornell Brown). The claims against the University, Landside, and Brown were dismissed.¹⁸³ The court only considered the VAWA issue and some of the state law claims against Morrison and Crawford.¹⁸⁴

b. The Law

Initially, the court determined whether Brzonkala's complaint stated a claim upon which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court measured the sufficiency of the VAWA claim by determining whether Brzonkala had adequately alleged that her rape was a "crime of violence motivated by gender."¹⁸⁵ After finding that the complaint was sufficient, the court relied upon "generally accepted guidelines" for identifying hate crimes and considered the following characteristics used to determine whether a crime is bias related: "[the] language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without a robbery, for example; common sense."¹⁸⁶ The court found that "gender animus more than likely played a part in these rapes

178. *See id.*

179. *See id.*

180. *See id.*

181. 20 U.S.C. § 1681 (1994).

182. 42 U.S.C. § 13981 (1994).

183. *See Brzonkala I*, 935 F.Supp. at 781.

184. *Id.*

185. *See* 42 U.S.C. § 13981(d)(1) (1994).

186. *Brzonkala I*, 935 F. Supp. at 784 (quoting S. Rep. No. 197, 102nd Cong., 2d Sess. 50 n. 72).

than in some other types of rape.”¹⁸⁷ In conclusion, the court held that “[t]he characteristics of the rape combined with Morrison’s statements are sufficient at least to meet the minimal federal pleading requirement.”¹⁸⁸

In so holding, the court considered the following characteristics of the rapes: this was a gang rape, indicating a conspiracy of disrespect for women; this was a stranger rape, indicating disrespect solely on the basis of the victim’s gender, as the perpetrators had no knowledge of her personality; and the comments made by Morrison immediately and sometime after the rape, as further evidence of his disrespect for Brzonkala, and women in general.¹⁸⁹ The court ruled that, as against Morrison, Brzonkala had sufficiently stated a VAWA claim pursuant to federal minimum pleading requirements. As against Crawford, the court found it unnecessary to decide whether Brzonkala had stated a claim because the court’s decision would ultimately render the VAWA unconstitutional.¹⁹⁰

The court applied a very strict interpretation of the recently-decided *Lopez* decision to find that the VAWA was an unconstitutional exercise of Congress’ Commerce Clause authority. The *Brzonkala I* court reiterated the *Lopez* framework, stating:

Under its commerce power, Congress may regulate three broad categories of activity. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress may regulate and protect the instrumentalities of commerce or the persons or things in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress may regulate those activities having a substantial relation to interstate commerce.¹⁹¹

The Court then summarily dismissed the first two categories of permissible regulation as inapplicable, thus focusing its analysis on whether the VAWA regulated an activity that had a substantial effect on interstate commerce.¹⁹²

The *Brzonkala* court, in its application of the *Lopez* standard to the case at bar, cited the congressional findings in support of the VAWA, but it quickly dismissed them by using direct language from the *Lopez* opinion: “Notably, the *Lopez* Court stated, ‘[S]imply because Congress may conclude that a particular activity affects interstate commerce does

187. *Id.* at 784.

188. *Id.* at 785.

189. *Id.* at 784-85.

190. *Id.* at 785, 801.

191. *Id.* at 786.

192. *Id.*

not necessarily make it so.’”¹⁹³ The court also asserted, “‘Whether particular operation affects interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial question, and can be settled finally on by this Court.’”¹⁹⁴

Next, the court compared the differences between the regulated activity in *Lopez* with the regulated activity in the case at bar. The court found the lack of congressional findings in *Lopez* and the abundant congressional findings in *Brzonkala* to be insignificant.¹⁹⁵ As quoted above, congressional findings do not always dictate that the activity indeed affects interstate commerce. Then, the court dealt with the assertion that the statute at issue is civil while the *Lopez* Gun Free School Zones Act was criminal. The court determined that this was not necessarily correct, in that the VAWA is criminal in nature “designed to address problems in the state criminal justice system, . . . it creates a civil cause of action that seeks to vindicate a criminal act.”¹⁹⁶ It also found this difference to be inconsequential.

The court discussed another possible difference found in the “steps of causation” as fewer in the case at bar than in *Lopez*.¹⁹⁷ The steps of causation refer to how distant the regulated activity actually is from affecting interstate commerce. The court dismissed this difference with the following: “Even accepting the step analysis as helpful and accepting that the case at hand involves fewer steps than the situation in *Lopez*, both situations involve regulated activity which is too remote from interstate commerce.”¹⁹⁸ Thus, the court determined that any differences between the two cases were inconsequential and need not be given any real consideration.

The court focused on the similarities between the two cases. First, the two statutes involved a regulation of an intrastate activity that is not commercial in nature. It claimed that the VAWA, like the Gun Free Zone Act of 1990, simply regulated local criminal activity.¹⁹⁹ Further, the court summarily discounted the *Wickard* aggregate affect theory as was espoused in the VAWA’s and Gun Free School Zones Act’s “cost of crime” arguments.

In addition, the court looked at the lack of a jurisdictional nexus in both statutes, claiming that neither statute had a jurisdictional element:

193. *Id.* at 788 (citing *Lopez*, 115 S.Ct. at 1629, citing *Hodel v. Virginia Surface Mining and Reclamation Ass’n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J. concurring)).

194. *Id.* at 788-89 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. at 273).

195. *Id.* at 789.

196. *Id.* at 790.

197. *Id.*

198. *Id.* at 791.

199. *Id.*

“Although it is unclear whether such a jurisdictional requirement is needed, indications exist that such a requirement may be necessary.”²⁰⁰ The court cited several cases to that effect.²⁰¹ Finally, the court cited the last similarity: “[S]imilar to the situation in *Lopez*, permitting the VAWA as a constitutional exercise of the commerce power would have the practical result of excessively extending Congress’s power and of inappropriately tipping the balance away from the states.”²⁰²

After weighing the similarities of *Lopez* against the “insignificant” differences, the court poured salt in the VAWA’s wounds by stating, “Showing that something affects the national economy does not suffice to show that it has a substantial effect on interstate commerce.”²⁰³ The court claimed that if such a chain of causation sufficed, Congress’ power would extend to an unbounded extreme:

Defendants point out that facts show that insomnia costs the United States \$15 billion a year This is as much as the yearly cost of domestic abuse. Other sources indicate that the cost of insomnia is much higher Insomnia undoubtedly also has some effect on interstate travel as insomniacs travel across state lines for treatment However, to extend Congress’s power to these issues would unreasonably tip the balance away from the states.²⁰⁴

Ultimately the court concluded, “The combination of the insignificance of the differences between the case at hand and *Lopez* and the significance of the similarities leads to the conclusion that Congress acted beyond its commerce power in enacting VAWA.”²⁰⁵

3. BRZONKALA’S APPEAL TO THE FOURTH CIRCUIT

Brzonkala subsequently filed an appeal to the Fourth Circuit Court of Appeals.²⁰⁶ The three judge panel voted two-to-one to uphold the constitutionality of the VAWA, thus reversing the district court.²⁰⁷ Its ruling survived only six weeks, until it granted a request to vacate the decision and grant a rehearing *en banc*. Although the Fourth Circuit Court of Appeals vacated the earlier panel’s ruling, it is important to examine the rationale behind the majority and dissenting opinions, which provide some interesting perspective on the VAWA debate.

200. *Id.* at 792.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 793 (citations omitted).

205. *Id.*

206. See *Brzonkala II*, 132 F.3d 949 (4th Cir. 1997).

207. *Id.*

The panel's majority upheld the constitutionality of the VAWA.²⁰⁸ The court analyzed the *Lopez* decision by first determining whether Congress had a rational basis to find the connection to interstate commerce and, next, by determining whether the VAWA abrogated state authority. The majority held that Congress did indeed have a rational basis in finding the connection to interstate commerce. It held that Congress was regulating an area that was quintessentially federal.²⁰⁹ The dissent, on the other hand, suggested that the majority's ruling was an analytically superficial interpretation of *Lopez*. It further claimed that the majority suffered from a "manifest misreading of the Supreme Court's historically significant *Lopez* decision."²¹⁰

The majority started its analysis of the case with Congress's "voluminous findings," which supported the connection between interstate commerce and gender-motivated crimes.²¹¹ The majority panel grounded Congress' rational basis on these findings, using such language as "numerous and specific findings and a mountain of evidence," "detailed and extensive," and "exhaustive and meticulous investigation."²¹² It relied upon the *Lopez* proposition that Congress' rational basis for linking an intrastate activity to interstate commerce must be identified through congressional findings. The Fourth Circuit has consistently upheld Commerce Clause cases on less stringent findings, therefore, it was no surprise that the panel majority had "no hesitation similarly upholding the VAWA."²¹³

The majority's opinion did not end with the rational basis test. It went further to discuss whether the VAWA intrudes upon areas traditionally left to the state.²¹⁴ First, the panel majority reasoned that the VAWA was a civil rights statute, not a criminal statute.²¹⁵ Understood this way, the VAWA did not abrogate any authority traditionally left to the state, such as criminal law, and was well within the federal realm of civil rights. The panel majority stated that civil rights had been a "federal responsibility since shortly after the Civil War," making federal civil rights legislation a "quintessential area of federal expertise."²¹⁶

Next, the panel majority noted that Congress not only understood its Commerce Clause authority when it enacted the VAWA, but it took

208. *Id.* at 974.

209. *Id.* at 963-73.

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

211. *See id.* at 968.

212. *Id.*

213. *Id.*

214. *See id.* at 970-71.

215. *Id.* at 970.

216. *Id.* at 971.

that power seriously and acted within its well-established boundaries.²¹⁷ Thus, the majority held that the VAWA was a constitutional exercise of Congress' Commerce Clause authority.²¹⁸

The dissenting opinion, written by Circuit Judge Luttig, suggested that the majority's opinion had made a fundamental mistake in misreading *Lopez* because it had conducted only a superficial analysis of the nexus between interstate commerce and gender-motivated violence.²¹⁹ Particularly, the dissent chastised the majority opinion because it "merely recit[ed] several statements from the House and Senate committees . . . and then simply stat[ed], without more, that the Act [was] constitutional."²²⁰ The dissent's main concern was that the majority had failed to apply the *Lopez* requirement that the court conduct an "independent evaluation" of the connection.²²¹ The panel dissent argued that Congress' findings were no more than a mere single conclusory statement that there was a connection, a finding that was "functionally no different from a complete absence of express congressional findings."²²² It claimed that the majority had acted as if *Lopez* had never been decided, and it concluded with a prediction that the Supreme Court would not allow such a "bold intransigence in the face of the Court's recent [*Lopez*] decision. . . ."²²³ The dissenting opinion obviously did not go unheard, for the Fourth Circuit Court of Appeals vacated the panel decision merely six weeks after it had been rendered.

4. FOURTH CIRCUIT COURT OF APPEALS *EN BANC* PROCEEDING

After an *en banc* hearing, and a year of deliberation, having received an onslaught of amici briefs, the Fourth District Court of Appeal ruled that the Violence Against Women Act was an unconstitutional exercise of Congress' Commerce Clause power.²²⁴ The court's opinion, written by Justice Luttig (the dissenter in the previous Court of Appeals ruling) relied heavily upon the Supreme Court's rational in *Lopez* to strike down the VAWA. It is useful to examine the court's opinion in detail, to gain a better understanding of the arguments that will surface when the Supreme Court hears this case.

"We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our fed-

217. *Id.* at 973.

218. *Id.* at 974.

219. *See generally id.* at 974-78.

220. *Id.* at 974.

221. *See id.*

222. *Id.* at 976.

223. *Id.* at 977.

224. *See Brzonkala III*, 169 F. 3d 820 (4th Cir. 1999).

eral government would be one of enumerated powers, and that all power enumerated would be reserved to the several and to ourselves.”²²⁵ The opinion, from beginning to end, was a grandiose and arguably eloquent manifesto of states’ rights, as if Judge Luttig were really getting the last laugh on the matter. “These simple truths of power bestowed and power withheld under the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.”²²⁶

The court delved into the VAWA by first recognizing that it was enacted in “response to the problems of domestic violence, sexual assault, and other forms of violent crime against women.”²²⁷ It went on to recognize that the VAWA contained a “host of provisions, only one of which we address today.”²²⁸ The focus of the ruling was on § 13981(c), the civil rights remedy of the statute. After providing the factual background of the case and its procedural history, the court addressed the threshold issue of the case: whether Brzonkala had stated a claim under § 13981 sufficient to withstand appellees’ 12(b)(6) motion to dismiss.²²⁹ The court found that Brzonkala had properly stated a claim.²³⁰ As that threshold issue was resolved, the court moved on to address the issue of whether § 13981 “represent[ed] a constitutional exercise of Congress’ power under either the Commerce Clause of Article I, Section 8, or Section 5 of the Fourteenth Amendment.”²³¹ Because *City of Boerne v. Flores*²³² had eliminated any defense based on Section 5 of the Fourteenth Amendment, the court moved directly to the Commerce Clause issue.

The opinion focused on the Supreme Court’s 1995 ruling in *Lopez*, particularly on the “substantially affects” test announced in that case. The court was convinced that the “substantially affects” test established the outer limits of congressional Commerce Clause power. It claimed:

Lopez made clear that such power does not extend to the regulation of activities that merely have some relationship with or effect upon interstate commerce, but, rather, extends only, as is relevant here, to those activities ‘having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate

225. *Id.* at 825-26.

226. *Id.* at 826.

227. *Id.* at 827.

228. *Id.*

229. *Id.* at 828.

230. *Id.* at 829.

231. *Id.* at 830.

232. 521 U.S. 507 (1997).

commerce.’²³³

Next, the court discussed two types of laws *Lopez* upheld as regulations of activities that substantially affect interstate commerce: “(1) ‘regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce’ . . . and (2) regulations that include a jurisdictional element. . . .”²³⁴

In analyzing the first type of permissible laws, the court found that the VAWA deals only with gender-based crimes, not economic-based crimes, and “thus explicitly excludes from its purview those violent crimes most likely to have an economic aspect — crimes arising solely from economic motives — and instead addresses violent crimes arising from the irrational motive of gender animus, a type of crime relatively unlikely to have any economic character at all.”²³⁵ The court also dismissed the argument that section 13981 was “‘an essential part of a larger regulation of economic activity’” that may be valid.²³⁶ As a result, the court found that section 13981 did not fit into the first permissible category of laws established by *Lopez*.

Additionally, the court found that section 13981 did not have the necessary jurisdictional nexus that would validate it under the second set of permissible laws.²³⁷ The court concluded that “[b]ecause section 13981 neither regulates an economic activity nor includes a jurisdictional element, it cannot be upheld on the authority of *Lopez* or any other Supreme Court holding demarcating the outer limits of Congress’ power under the substantially affects test.”²³⁸ Finally, the court delivered an “in the alternative,” “federalism concerns” argument, reasoning that even if these two categories did not demarcate the absolute outer limit of congressional authority, they certainly demarcated the presumptive outer limits.²³⁹

The court then addressed the appellants’ attempt to link gender-based violence to interstate commerce by arguing that “violence motivated by gender animus imposes medical and legal costs upon its victims” and that it “discourages those who fear such violence from traveling, working, or transacting business at times or in places that they

233. *Brzonkala III*, 169 F. 3d at 7 830-31 (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)).

234. *Id.* at 831.

235. *Id.* at 834.

236. *Id.*

237. *Id.* at 836.

238. *Id.*

239. *Id.* at 837-38.

consider unsafe," thus deterring some interstate employment.²⁴⁰ As the arguments mirror those eviscerated in *Lopez*, so too are they eviscerated here:

It is unsurprising that appellants must resort to such arguments. Just as it is impossible to link violence motivated by gender animus with any particular, identifiable economic transaction or enterprise . . . it is similarly impossible to link such violence with a particular interstate market or with any specific obstruction of interstate commerce.²⁴¹

Furthermore, the court reiterated its federalism concerns, claiming that section 13981 would encroach upon areas traditionally left to the separate states: "[I]n this case, concerns of federalism, far from hypothetical, are immediate and concrete."²⁴² The court continued, "For when the federal government provides a remedy for violent crime in addition to that provided by the States, it both involves itself in the punishment of such crime and increases the total penalty for such crime beyond that provided by the laws of the States."²⁴³ The court thus concluded that VAWA encroached upon states' control over criminal issues. It further asserted that state family law, the most traditional of state regulation would also be abrogated.²⁴⁴

The court next addressed the appellant's argument that *Lopez* called for legislative findings in order to validate laws enacted under the Commerce Clause. This arises as one of the major issues tackled in virtually every VAWA case because many construe *Lopez* as meaning that through sufficient legislative findings, a law with questionable interstate commerce connections may be permissible. This understanding is based upon one short section in *Lopez*, where the court stated that legislative findings "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye."²⁴⁵ The *Brzonkala* court, however, also noted that *Lopez* had warned, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."²⁴⁶

The court continued by reiterating that the question of whether particular activities substantially affect interstate commerce is a judicial question, and the court cannot absolutely rely upon the strength of such

240. *Id.* at 838.

241. *Id.* at 839.

242. *Id.* at 840.

243. *Id.* at 841.

244. *Id.* at 843.

245. *United States v. Lopez*, 514 U.S. 549, 563 (1995).

246. *Brzonkala III*, 169 F.3d at 845 (quoting *Lopez*, 514 U.S. at 557).

congressional findings.²⁴⁷ Further, the court noted that *Lopez* could not “reasonably be understood to have turned on a mere lack of documentation . . . [because] had the Court desired only legislative corroboration of the government’s arguments, it could easily have consulted these findings, and presumably would have done so.”²⁴⁸

Finally, the *Brzonkala* court concluded that if the *Lopez* court had intended for congressional findings to be a proxy for an interstate commerce determination, it “would have constituted not a substantive limitation on congressional power, but rather a mere procedural hurdle—in essence, a remand to Congress to make formal findings or compile a formal record.”²⁴⁹

The opinion ended with a final anti-federalist sentiment:

Here, as in *Lopez*, the power that Congress has asserted is essentially limitless; the existence of findings or documentation, standing alone, does not provide the type of meaningful limitation on congressional power required by a Constitution that withholds from Congress ‘a general police power of the sort retained by the States.’²⁵⁰

IV. HATE CRIMES STATISTICS ACT

1. BACKGROUND

Over the last decade, hate crimes have received increasingly more publicity through the media and accordingly have commanded the legislature’s attention. In addition, there have been notable developments in federal law that address hate crimes. Among the most influential and important developments is the Hate Crimes Statistics Act of 1990 (the HCSA),²⁵¹ which authorizes the Attorney General to collect data on enumerated crimes that “manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity” from local police departments.²⁵² Unlike the hate crime laws passed by many state legislatures, the HCSA is merely a statistics gathering law and is strictly limited to that function. Compliance with the HCSA, however, remains voluntary, and many cities do not participate in the HCSA. Of the jurisdictions that do participate, many continually report zero hate crimes.

The HCSA is designed to serve several purposes. First, it seeks to gather the empirical data necessary for the development of effective pol-

247. *Id.*

248. *Id.* at 846.

249. *Id.* at 848.

250. *Id.* at 852 (quoting *Lopez*, 514 U.S. at 567).

251. Pub. L. No. 101-275, 104 Stat. 140 (codified in part at 28 U.S.C. § 534 (1994)).

252. *Id.* § 1(b)(1), 104 Stat. 140 (codified in part at 28 U.S.C. § 534 (1994)) (applying to crimes of murder; non-negligent manslaughter; forcible rape; aggravated assault; simple assault; intimidation; arson; and destruction, damage, or vandalism or property).

icies to fight hate-motivated violence. Further, it raises the public's awareness of hate-motivated crimes and underscores the need for an official state and federal response. Most importantly, the HCSA requires police department involvement in the process of identifying and accounting for hate crimes, which may aid law enforcement officials in measuring trends, fashioning effective responses, designing prevention strategies, and developing sensitivity training particular to the needs of hate crime victims.

The HCSA was supported by a strong coalition of civil rights groups that focused on the creation of a government-run system with local police department involvement to collect data, report on hate crimes, and train law enforcement officers to identify and respond to hate crimes. Many government officials agreed with this approach, and, in 1983, the U.S. Commission on Civil Rights recommended that federal and state authorities "develop workable reporting systems that will produce an accurate and comprehensive measurement of the extent of criminal activity that is clearly based on racial and/or religious motivations."²⁵³ The HCSA represents an advance in the battle against hate crimes in that it is the first federal legislation requiring the government to collect specific data on hate crimes. Further, it recognizes violence against gays and lesbians as a hate crime.

2. AN OVERVIEW

Section 1(b)(1) of the HCSA requires that the Attorney General acquire data about crimes that "manifest evidence of prejudice based on race, religion, sexual orientation and ethnicity." These enumerated crimes include: murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson and destruction, and damage or vandalism of property. Section 1(b)(2) mandates that the Attorney General establish guidelines for data collection. The guidelines should include the necessary evidence and criteria that must be present for a finding of manifest prejudice, as well as the procedures for implementing the HCSA. Section 1(b)(3) expressly states that the HCSA does not create a new cause of action or right to bring an action based on discrimination due to sexual orientation, defined in this section as "consensual homosexuality or heterosexuality." Although the HCSA does not create new rights, neither does it limit the right to bring an action under existing statutes. Section 1(b)(4) is a confidentiality measure, restricting the use of data collected under the HCSA to research and statistical purposes. Additionally, the data collected may not con-

253. U.S. COMMISSION ON CIVIL RIGHTS: INTIMIDATION AND VIOLENCE: RACIAL AND RELIGIOUS BIGOTRY IN AMERICA 28 (1983).

tain any information which might reveal the identity of the individual victim of a crime. Section 1(b)(5) mandates that the Attorney General publish an annual summary of the data acquired under the HCSA.

Section 2(a) of the HCSA provides the following:

Congress finds that:

The American family life is the foundation of American society,
Federal policy should encourage the well-being, financial security,
and health of the American family Schools should not de-emphasize
the critical value of American family life.

Further, section 2(b), emphasizes that nothing in the Act should be construed to promote or encourage homosexuality, nor that any funds appropriated to carry out the HCSA would be used for such purposes.

3. LEGISLATIVE HISTORY

In response to the emergence of high levels of hate-motivated crimes, two bills requiring the counting of hate crimes were introduced in the House of Representatives in 1985: H.R. 775 and H.R. 1171. Both bills were conceived as modest federal efforts against hate-motivated violence. Initially, the bills focused on tracing crimes motivated by racial, ethnic, and religious prejudice, thus disregarding crimes based on sexual orientation.

Organizations created to fight hate crimes, such as the International Network of Jewish Holocaust Survivors, the Anti-Klan Network, and the Institute for Prevention and Control of Violence and Extremism, testified before Congress in support of the bills.²⁵⁴ The bill moved easily through the House because it was relatively uncontroversial and simply called for data gathering; however, the Senate adjourned before it could pass the bill.

In 1986, the House held special hearings on the religious motivated violence section of the bill and passed a bill making such violence a federal crime.²⁵⁵ Unfortunately, the Senate failed to vote on the 1986 bill before adjourning, but the 100th Congress finally passed legislation criminalizing religious motivated violence.²⁵⁶

At the same time, the gay and lesbian communities who were excluded from the legislative initiatives, began data collection of their own. The National Gay and Lesbian Task Force (NGLTF) established its own data collection on violent victimization through community,

254. See Hate Crimes Statistics Act: Hearings on H.R. 1171 and H.R. 775. Before the Subcommittee on Criminal Justice of the House Commission on the Judiciary, 99th Cong., 1st Session. (1985).

255. See H.R. REP. NO. 99-820 (1986).

256. See H.R. REP. NO. 100-337 (1987); Pub L. No. 100-346 § 1, 102 Stat. 644 (codified in 18 U.S.C. § 247 (1988)).

campus, and religious organizations.²⁵⁷ Pleas by the NGLTF for participation in and support of studies and programs on hate violence conducted by the Justice Department's National Institute of Justice and its Office for Victims of Crime, the U.S. Commission of Civil Rights, and the Center for Disease Control Violence Epidemiology Project were all denied.²⁵⁸

In 1985, the NGTLF finally had a voice in Representative Barney Frank (D-Mass.), who prevailed upon the Criminal Justice Subcommittee of the House Judiciary Committee to conduct an oversight hearing on the problem of anti-gay violence. The October 9, 1986, hearing promoted discussion on the kinds of anti-gay violence occurring around the nation, as well as the institutional responses by state and federal agencies.²⁵⁹ The hearings addressed the shortcomings of federal agencies in collecting information about anti-gay violence. All participating groups urged Congress to enact a law to monitor anti-gay violence.

After the hearings, gay and lesbian rights groups joined forces to support and lobby in favor of a revised bill, which included sexual orientation. The bill adopted by the House in the 100th Congress was the model for the Hate Crimes Statistics Act, which included the term "sexual orientation," along with race, religion, and ethnicity. The definition of "sexual orientation" included "male or female heterosexuality, homosexuality, or bisexuality by orientation or practice between consenting adults."²⁶⁰

Of course, the bill was met by severe opposition from party conservatives. In a dissent to the Committee Report, five members of the House Judiciary Committee opposed the inclusion of sexual orientation in the bill.²⁶¹ They argued that the primary object of the federal hate crimes statistics bill was to "inspire Federal legislation to counteract hate crimes or assist in the allocation of Federal law enforcement resources."²⁶² They further argued that gays and lesbians possess no special rights deserving protection by federal legislation or law enforcement efforts and that in the absence of evidence that crime against gays and lesbians is perpetrated through the use of interstate networks, no intervention of federal law enforcement is required.²⁶³

257. NGLTF, *ANTI-GAY VIOLENCE, VICTIMIZATION & DEFAMATION IN 1989*, at ii (1990).

258. See *Anti-Gay Violence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong. 16-17, 27 (1986) (testimony of Kevin Berill).

259. See *id.* at 15-17, 27.

260. H.R. REP. NO. 100-575 (1988).

261. See *id.* at 12 (dissenting view of Representatives Gekas (R-Pa.), McCollum (R-Fla.), Coble (R-N.C.), Dannemeyer (R-Cal.), and Smith (R-Tex) to H.R. 3193).

262. *Id.*

263. See *id.*

Representative Conyers, in response to the dissenters' concerns, noted that the bill simply requires the collection of data to "guide the efforts of police, prosecutors, and the public" against hate crime.²⁶⁴ A clear understanding that the bill would not create substantive federal protection for gays and lesbians was crucial for the passage of the bill, and it resurfaced throughout the debate over passage. The bill was reported favorably by the Committee despite the objections, on October 20, 1987.²⁶⁵ In May, 1988, the bill was passed by the full House by a vote of 388 to 29.²⁶⁶

With the support of law enforcement groups, such as the Police Executive Research Forum, the National Organization of Black Law Enforcement Executives, the Criminal Justice Statistics Administration, and the International Association of Police Chiefs, the coalition began to push the bill again, as soon as the 101st Congress convened. Although some members of the coalition wanted to add gender to the bill, most groups believed that the bill would not adequately address gender issues and that to expand the bill to include gender would not improve the current data collection on gender-based crimes. Further, some women's rights groups did not agree that the inclusion of gender in the act was the appropriate way to count gender-based crimes. Thus, the coalition decided against including gender in the bill.

The House bill moved quickly through the 101st Congress, passing only seven days after its reporting, by a vote of 368 to 47. Representative Dannemeyer (D-Cal.) strenuously objected to the bill, claiming it would "change the basic definition of the 1964 Civil Rights Act to include a new status that would have the dignity of being within the proscription [sic] of that act."²⁶⁷

In the interim, the Senate bill was quickly approved by the Judiciary Committee on March 9, 1989.²⁶⁸ Yet, Senator Jesse Helms held the bill in limbo for eleven months. Helms refused to enter into a time agreement, a procedure that limits the time for debate in which amendments may be offered. As the Senate's strongest voice against gay and lesbian rights, Senator Helms fought the bill on the ground that it gave undue protection and respectability to gays and lesbians. His proposed Helms amendment was countered by amendments by Senators Paul Simon (D-Ill.) and Orin Hatch (R-Utah).

When the bill finally reached the floor of the Senate, Senators

264. *Id.* at 8 (concurring view of Representative Conyers).

265. *See id.* at 6.

266. *See* 134 Cong. Rec. H3389 (daily ed. May 18, 1988).

267. 135 Cong. Rec. H3179, H3183 (daily ed. June 27, 1989).

268. *See* S. REP. NO. 101-21 at 5 (1989).

Simon and Hatch engaged Senator Helms in quarrelsome debate. Helms raised several objections to the bill, which centered around his belief that the bill did not conform with the sense of traditional family that America was founded upon. In addition, he argued that the bill would do nothing to fight crime, but would shift attention "away from actual criminal behavior and toward motivation behind the behavior."²⁶⁹ Senator Simon responded that any attention given to the motivation behind the crimes would ultimately help to identify and prevent actual criminal behavior.

Next, Senator Helms claimed that the coalition's numbers were inflated, and that most "violence" against gays and lesbians consisted of name calling, and did not constitute true crimes. Senator Hatch parried the argument by diverting attention to those senators who were leery about appearing pro-gay. He claimed, "It may be that some will try to use this data to call for gay rights legislation. But I do not see what good this data will do for that particular issue."²⁷⁰ Finally, Senator Helms argued that the bill was unworkable because there was no standard for gathering the data, instead, leaving it up to the Attorney General to determine. In response, Senator Hatch assured his colleagues that the Justice Department and the FBI were quite capable of crafting and implementing statistics guidelines. The Senate, passed the bill unpersuaded by Helms' arguments, by a 92 to 4 majority.²⁷¹ The President signed the bill into law on April 23, 1990, at a public signing ceremony.

4. THE REALITY OF THE HATE CRIME STATISTICS ACT

In reality, the Hate Crimes Statistics Act, though novel, is but a stitch on the laceration of hate crime in America. As a mere statistics gathering act, it affords absolutely no federal protection to those who are victimized by hate crime. Unfortunately, gay and lesbian victims with whom it may be more difficult to discern true hate crimes, remain overlooked.

When one examines how the act will be implemented, obvious defects become apparent. "Mistrust and misconceptions about the gay community and the police lead to two problems. First, victims of sexual orientation bias crimes either do not report these crimes to police or they conceal evidence of bias when making their reports."²⁷² Gays' and lesbians' past experience with police officers, including possible bias on both parts, may contribute to the fabrication or omission of certain evi-

269. 136 Cong. Rec. S1067, S1076 (daily ed. Feb. 8, 1990) (statement of Senator Helms).

270. *Id.* at S1080 (statement of Senator Hatch).

271. *See id.* at S1092.

272. Teresa Eileen Kibelstis, *Preventing Violence Against Gay Men and Lesbians: Should Enhanced Penalties at Sentencing Extend to Bias Crimes Based on Victims' Sexual Orientation?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309, 318-19.

dence of bias motivation. This, in turn, seriously undermines the police department statistics gathering process. A second problem is that "police may be disregarding evidence of bias crimes when investigating incidents involving gay and lesbian victims."²⁷³

The most troubling question remaining after the passage of the Hate Crimes Statistics Act, however, is how the Act will prevent further hate crimes. While the majority of States have their own hate crimes laws, as observed in Mathew Shepard's case, there are still states that do not.²⁷⁴ What is needed is actual federal protection for victims of hate crimes.

The closest attempt at arriving at a federal hate crimes law is not comprehensive. Under 18 U.S.C. § 245, one can be federally prosecuted for a hate crime, only if the crime was motivated by bias based on race, religion, national origin, or color, and if the assailant intended to prevent the victim from exercising a federally protected right. This dual requirement of bias motivation and prevention of a federally protected right seriously limits the efficacy of the law. In response to this limitation and the limitation imposed by the Hate Crimes Statistics Act, a bill was finally proposed to enhance federal enforcement of hate crimes: The Hate Crimes Prevention Act of 1998.

It is beyond the scope of this article to delve into the debate over the Hate Crimes Prevention Act of 1998, although a look at the Act's intended effects is helpful. The Act would expand federal jurisdiction to reach serious violent hate crimes, regardless of whether the victim was exercising a federally protected right. The bill describes hate crime as a violent act attempting to cause bodily injury "because of the actual or perceived race, color, religion, or national origin" or "gender, sexual orientation, or disability" of the victim.²⁷⁵

In addition, the Act would have the nexus requirement that the perpetrator traveled in interstate commerce or used the facilities of interstate commerce. The bill will likely be met with resistance similar to the predecessor Hate Crimes Statistic Act. Still, the Act is desperately needed, given that the Hate Crimes Statistics Act is seriously insufficient in combating the widespread national problem of hate crimes.

V. CONCLUSION

The Fourth Circuit Court of Appeals *Lopez*-based arguments are cogent and portend that the Supreme Court will hold the Violence Against Women Act unconstitutional. The only argument in support of

273. *Id.* at 319.

274. Only twenty-one states and the District of Columbia include sexual orientation-based crimes in their hate crimes statutes.

275. Hate Crimes Prevention Act of 1998, S. 1529, 105th Cong. §4.

its constitutionality seems to rest on the “congressional findings” requirement. If the Court does find that the VAWA is constitutional, it will likely base its decision on the four years of congressional hearings and voluminous fact-finding as a sufficient demonstration of connection to interstate commerce. This decision would bode well for further federal protection for gays and lesbians. The Hate Crimes Statistics Act may be considered a grand-scale congressional fact-finding and thus serve as substantial evidence of an interstate commerce connection.

It is more likely, however, that the Court will use *Lopez* as the outer demarcation of Congress’ power.²⁷⁶ This, in turn, would render the Hate Crimes Statistics Act an ineffectual data gathering tool, rather than a stepping stone to further protection.

ALEXANDER DOMBROWSKY

276. During the editing of this article, the Supreme Court furthered the *Lopez* decision. It announced its continued advance toward “states’ rights,” rendering the *Kimel v. Florida Board of Regents*, 13 FLA. L. WEEKLY FED. §25, No. 98-791 (Jan. 11, 2000) decision. In *Kimel*, the court struck down the Age Discrimination in Employment Act thereby allowing abrogation of State’s immunity. This case, argued during the same session as *Morrison*, protects the unconstitutionality of the VAWA.