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COMMENT

BRZONKALA V. VIRGINIA POLYTECHNIC AND STATE UNIVERSITY¹: THE CONSTITUTIONALITY OF THE VIOLENCE AGAINST WOMEN ACT²—RECOGNIZING THAT VIOLENCE TARGETED AT WOMEN AFFECTS INTERSTATE COMMERCE

INTRODUCTION

Every 15 seconds, a woman is beaten by her husband or boyfriend. Every six minutes, a woman is forcibly raped Even women who have not themselves been victims pay a high price for being a female. They must routinely take precautions to protect themselves from the omnipresent threat of sex-based violence.³

For four years Congress conducted extensive hearings detailing the pervasive, yet often unrecognized incidents and effects of violence against women. In September 1994, these hearings culminated with Congress' passage of the Violence Against Women Act ("VAWA"),⁴ in response to the overwhelming problem of violent acts against women in the United

¹ 935 F. Supp. 779 (W.D. Va. 1996).

² 42 U.S.C. § 13981 (1994). This section of the Violence Against Women Act, under which Christy Brzonkala brought her claim, entitles a victim of gender-based violence to recover damages from her attacker.

³ These disturbing revelations were part of the testimony of Helen R. Neuborne, then executive director of the NOW Legal Defense and Education Fund, given before the Senate Committee on the Judiciary. *Women and Violence: Hearing Before the Comm. on the Judiciary United States Senate on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong. 57 (1990) [hereinafter *Senate Hearing 1990*] (statement of Helen R. Neuborne, executive director of the NOW Legal Defense and Education Fund).

⁴ Pub. L. No. 103-322, Title IV (1994) (codified at 42 U.S.C. § 13701 (1994)).

States. In part, VAWA provides a federal civil right and remedy for victims of gender-based violence.⁵ VAWA declares that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."⁶ As a remedy for violation of this right, in 42 U.S.C. § 13981(c), VAWA sets forth a cause of action entitling the victim to damages.⁷ It was under this section of VAWA that Christy Brzonkala brought claims against Virginia Polytechnic Institute and State University ("VPI") and several other individuals based on her alleged rape by two VPI football players.⁸

In *Brzonkala v. Virginia Polytechnic Institute and State University*, the United States District Court for the Western District of Virginia held that "VAWA is an unconstitutional exercise of Congress' power, unjustified under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment."⁹ This Comment argues that VAWA is a valid exercise of Congress' power under the Commerce Clause,¹⁰ and as such is constitutional. Part I of this Comment briefly outlines VAWA's legislative history. Part II reviews the facts of *Brzonkala* and the district court's opinion, focusing on the rationale used to find VAWA unconstitutional. Part III surveys the United States Supreme Court's modern Commerce Clause

⁵ "It is the purpose of this subtitle to protect the civil rights of victims of gender-motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." 42 U.S.C. § 13981(a) (1994).

⁶ *Id.* at § 13981(b).

⁷ Specifically, "[a] person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." *Id.* at § 13981(c).

⁸ *Brzonkala*, 935 F. Supp. at 781.

⁹ *Id.* at 801. This was the first time VAWA was held to be unconstitutional. It had been considered by a court once before. See *Doe v. Doe*, 929 F.Supp. 608 (D. Conn. 1996) (holding VAWA to be a constitutional exercise of Congressional power under the Commerce Clause). The court first considered whether *Brzonkala* stated a claim under VAWA for the purpose of FED. R. CIV. P. 12(b)(6) and concluded that she did. *Brzonkala*, 935 F.Supp. at 801. See *infra* notes 46-50 and accompanying text.

¹⁰ U.S. CONST., art. I, § 8, cl. 3. Article I of the U.S. Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." *Id.*

jurisprudence. Part IV analyzes the *Brzonkala* decision by comparing and contrasting Supreme Court precedent to the *Brzonkala* decision, focusing on *United States v. Lopez*,¹¹ which the district court heavily relied upon in formulating its decision. Finally, this Comment concludes that the district court was incorrect in its understanding of and strict adherence to the *Lopez* decision. Thus, the court should have found VAWA to be a constitutional exercise of Congress' Commerce Clause power since violence against women substantially affects interstate commerce.

I. VAWA'S LEGISLATIVE HISTORY

In 1994, Congress concluded that violence against women substantially affects interstate commerce, and that, since its effects are deleterious, it needs to be regulated on a national level. In determining whether the wide ranging¹² regulations proposed by VAWA were necessary, Congress held hearings over a four year period, hearing testimony and compiling documentation on how gender-based violence impacts interstate commerce and interferes with a woman's right to equal protection under the law.¹³ Congress found that: 1) violence is the leading cause of physical injury to women¹⁴ and 2) homicide is the leading cause of death of women in the workplace.¹⁵ In addition to hearing shocking first hand and anecdotal accounts of women being raped, beaten and otherwise terrorized, Con-

¹¹ 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act of 1990 unconstitutional as exceeding Congress' Commerce Clause authority).

¹² The Act also authorizes spending \$1.6 billion over six years for grants to support state and local law enforcement and prosecution efforts to reduce violent crime against women (42 U.S.C. § 3796gg), education and prevention programs (42 U.S.C. § 300w-10), battered women's shelters (42 U.S.C. § 10409(a)), and community programs on domestic violence (42 U.S.C. § 40251). *Doe v. Doe*, 929 F. Supp. 608, 611 n.3 (D. Conn. 1996).

¹³ *Doe*, 929 F. Supp. at 610-11.

¹⁴ Julie Goldscheid & Pamela Coukos, *Violence Against Women Affects the Workplace: Legal Remedies for Women and Advocates*, 30 CLEARINGHOUSE REV. 195 (Special Issue 1996) (citing Patricia Horn, *Beating Back the Revolution: Domestic Violence's Economic Toll on Women*, DOLLARS & SENSE, Dec. 1992, at 12-13).

¹⁵ Goldscheid & Coukos, *supra* note 14, at 196 (citing WOMEN IN PUBLIC SERVICE, HIDDEN VIOLENCE AGAINST WOMEN AT WORK (1995)).

gress heard evidence that the ongoing victimization of women had a large impact on the nation's commerce.¹⁶ The evidence was overwhelming.

A. *Impact on Employers*

In determining that violence against women substantially affects interstate commerce, Congress considered its effects on businesses. This was an important consideration since women

¹⁶ Congress found, in part:

in 1991, at least 21,000 domestic crimes were reported to the police every week; at least 1.1 million reported assaults—including aggravated assaults, rapes, and murders—were committed against women in their homes that year; unreported domestic crimes have been estimated to be more than three times this total. Every week, during 1991, more than 2,000 women were raped, and more than 90 women were murdered—9 out of 10 by men. Women are six times more likely than men to be the victim of a violent crime committed by an intimate; estimates indicate that more than one of every six sexual assaults a week is committed by a family member. Violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined. As many as 4 million women a year are the victims of domestic violence. Three out of four women will be the victim of a violent crime sometime during their life. S. Rep. No. 103-138, at 37 (1993) (footnotes omitted).

The Senate Report concluded that:

Gender-based violent crimes meet the modest threshold required by the Commerce Clause. Gender-based crimes and fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full participation [sic] in the national economy. For example, studies report that almost 50% of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence. This was precisely the rationale on which the Supreme Court relied in upholding the 1964 Civil Rights Act with respect to race (and presumably, sex as well). *Id.* at 54.

The House Conference Report found:

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

H.R. Rep. No. 103-711, at 385 (1994).

constitute 50% of the labor force and 36% of the business executives in the United States.¹⁷

Victims of gender-based violence suffer physical and psychological effects in the workplace, which decrease individual productivity and result in economic loss, in addition to the victim's personal pain.¹⁸ In testifying about workplace concerns, a representative of the Polaroid Corporation cited "such bottom line issues as tardiness, poor performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress and substance abuse."¹⁹

Similarly, in testimony before the Senate Committee on the Judiciary, Helen R. Neuborne, then executive director of the NOW Legal Defense and Education Fund, presented substantial evidence of the effects of violence against women on employers and commerce.²⁰ Ms. Neuborne cited several studies. Statistics on abused women from a 1985 National Family Violence Resurvey by the Department of Criminal Justice report that women who were severely attacked (i.e., those women who were kicked, bitten, punched, choked, burned, beaten or had weapons used against them) spent twice as many days in bed as other women, reported being in poor health three times more than other women, had two times as many headaches, four times the rate of depression, and five-

¹⁷ *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Committee on the Judiciary*, 103d Cong. 43 (1993) (statement of Burt Neuborne, Professor of Law, New York University; previously served as National Legal Director of the ACLU; member, New York City Commission on Human Rights).

¹⁸ *Id.*

¹⁹ Goldscheid & Coukos, *supra* note 14, at 195 n. 2 (Special Issue 1996) (citing *Hearing on Domestic Violence: Hearing Before the Sub Comm. on the Judiciary*, 103d Cong. (1993) (statement of James Hardeman, Polaroid Corp)).

²⁰ *Senate Hearing 1990, supra* note 3, at 68 (statement of Helen R. Neuborne). The same evidence was also presented to the Senate in 1991 by the National Federation of Business and Professional Women, Inc. See *Violence Against Women: Victims of the System: Hearing on S.15 A Bill To Combat Violence and Crimes Against Women on the Streets and in Homes Before the Comm. on the Judiciary United States Senate*, 102d Cong. 239-40 (1991) [hereinafter *Hearing: Violence Against Women*] (statement of National Federation of Business and Professional Women, Inc. on Violence Against Women, presented by Elizabeth Athanasakos, National President). This evidence (in part) was presented to the House in 1993 by Sally Goldfarb, senior staff attorney of the NOW Legal Defense and Education Fund. See *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 103d Cong. 13 (1993) (statement of Sally Goldfarb).

and-a-half times more suicide attempts.²¹ Moreover, in a survey of abused women, 9.3% reported being absent from work due to domestic violence, while 19% of those who were severely assaulted missed time from work.²² Similarly, a New York survey recently found that 54% of abused women miss three days of work per month due to abuse, and 74% are harassed by their abusers at work.²³ Harassment at the victim's workplace and time spent waiting to appear in court reduces the victim's ability to maintain or secure employment and increases absenteeism rates.²⁴ Absenteeism affects employers by increasing their costs. Whether these costs are incurred by hiring temporary workers, suffering losses in productivity, or having to hire new workers, they are all caused by violence against women.

Nationally, domestic violence has been estimated to cost employers between three and five billion dollars annually due to absenteeism from work.²⁵ Recent studies have documented a decline in concentration and overall work performance of female victims of violence,²⁶ which surely carries a great, if dif-

²¹ *Senate Hearing 1990*, *supra* note 3, at 68 (statement of Helen R. Neuborne) (citing MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* 426 (1990)).

²² *Senate Hearing 1990*, *supra* note 3, at 69 (statement of Helen R. Neuborne) (citing MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* 157 (1990)).

²³ Goldscheid & Coukos, *supra* note 14, at 195 n.2 (citing New York City Victims Services Agency Report on the Costs of Domestic Violence, *cited in* NEW YORK STATE DEPT OF LABOR, REPORT TO THE NEW YORK STATE LEGISLATURE ON EMPLOYEES SEPARATED FROM EMPLOYMENT DUE TO DOMESTIC VIOLENCE 3 (Jan. 15, 1996)).

²⁴ *Senate Hearing 1990*, *supra* note 3, at 69 (statement of Helen R. Neuborne) (citing Conversations with Kristian Miccio, Director and Attorney in Charge, Sanctuary for Families, Center for Battered Women's Legal Services, and Beverly Sowande, New York Women's Bar Association, Committee on Battered Women (June 12, 1990)).

²⁵ *Senate Hearing 1990*, *supra* note 3, at 69 (statement of Helen R. Neuborne) (citation omitted).

²⁶ *Senate Hearing 1990*, *supra* note 3, at 69 (statement of Helen R. Neuborne) (citing Milt Freudenheim, *Employers Act to Stop Family Violence*, N.Y. TIMES, Aug. 23, 1988, at 1). "Learned helplessness and depression, typical characteristics of the battered woman's syndrome, may contribute to the deterioration of victims' employment performance. Learned helplessness, a feeling that the victim cannot control the events in her life with the batterer, often generalizes to other areas of the victim's life. Depression results in decreased motivation, loss of emotional and physical energy and a lowered initiation of voluntary actions." *Senate Hearing*

difficult to quantify, cost to employers. Medical costs related to domestic violence are estimated at about \$100 million per year,²⁷ and some of these costs are surely borne by employers, even if only through higher insurance premiums.

Because women constitute a large segment of the work force and the effects of violence against women are so pervasive, such violence clearly affects economic concerns and just as clearly has an adverse impact on interstate commerce.

B. *Economic Impact on Women*

Although the impact of violence against women on employers and employees is certainly interrelated, some economic impacts are more intensely felt by women as individuals. The Statement of the National Federation of Business and Professional Women, Inc. ("BPW"), which was presented to the Senate in 1991, made clear that, in addition to affecting employers, violence against women affects women in their role as employees.²⁸ A 1980 psychological journal reported that close to 50% of rape victims studied were forced to quit their jobs within the year following the rape.²⁹ A Minnesota study reported that one-third of the women studied said that their abusing husbands had prohibited them from working; one-fourth said their abusing husband had prohibited them from going to school; almost 25% said that they lost a job partly due to being abused; and over 50% said that their abuser harassed them at work either by phone or in person.³⁰ An American Insurance Association pilot study found that 40% of battered women studied lost a job due to abuse and over 70% were harassed at work by the abuser. Furthermore, over half of the women studied reported late for work five or more times each month and missed work three days a month due to abuse.³¹

1990, *supra* note 3, at 77 n.34 (statement of Helen R. Neuborne) (citing C. EWING, BATTERED WOMEN WHO KILL 20-21 (1987)).

²⁷ *Senate Hearing 1990, supra* note 3, at 69 (statement of Helen R. Neuborne) (citation omitted).

²⁸ *Hearing: Violence Against Women supra* note 20, at 240-41 (statement of National Federation of Business and Professional Women, Inc. on Violence Against Women, presented by Elizabeth Athanasakos, National President).

²⁹ *Hearing: Violence Against Women, supra* note 20, at 242.

³⁰ *Hearing: Violence Against Women, supra* note 20, at 242-43.

³¹ *Hearing: Violence Against Women, supra* note 20, at 243.

In addition, the fear of violence affects women's economic opportunities. Fear of being out late at night or of taking public transportation drastically reduces the number of job opportunities a woman may consider.³² Women who cannot leave their homes or are afraid or embarrassed to show the physical effects of violence will forego available employment opportunities or jeopardize their current employment by absenteeism or poor work performance.³³

Violence not only affects current employees, but potential future employees as well. Congress heard testimony demonstrating that violence against women particularly affects female college students. One study reported that a woman college student has a one in thirteen chance of being raped in a given year.³⁴ Women victimized by rape while attending college often drop out of school or at least interrupt their attendance to avoid the attacker.³⁵ Ultimately, the effect on college attendance affects future careers (or the lack thereof), and therefore, women's economic position in society. This violence also affects employers by keeping potentially well educated and qualified applicants from entering the job market.

Violence against women affects employers and women in their role as employees as well as on an individual basis. Effectively, it keeps women from fully participating in the economy and often keeps them out of the job market. It further burdens commerce by causing businesses to incur substantial, otherwise unnecessary costs. In the aggregate, the numerous, recurring instances of violence against women surely have a substantial, negative impact on interstate commerce.

³² *Hearing: Violence Against Women*, *supra* note 20, at 241. See also *Senate Hearing 1990*, *supra* note 3, at 69 (statement of Helen R. Neuborne).

³³ *Hearing: Violence Against Women*, *supra* note 20, at 241 (statement of National Federation of Business and Professional Women, Inc. on Violence Against Women, presented by Elizabeth Athanasakos, National President).

³⁴ *Hearing: Violence Against Women*, *supra* note 20, at 243.

³⁵ *Hearing: Violence Against Women*, *supra* note 20, at 243. This is exactly what happened to Christy Brzonkala. See *infra* note 42 and accompanying text.

II. THE BRZONKALA CASE

A. *Alleged Facts*

Christy Brzonkala is an adult female who attended Virginia Polytechnic Institute and State University. On the night of September 21, 1994 and the morning of the next day, Brzonkala was raped in a room on the third floor of her dormitory by two men whom she and Hope Handley, another female student, had met less than a half hour earlier and whose identities she knew only by their first names and their status as VPI football players.³⁶ Initially, Brzonkala and Handley, along with Antonio Morrison and James Crawford, the two football players they had just met, were present in the room. Handley and Crawford left the room after fifteen minutes of conversation; Morrison then requested intercourse with Brzonkala. Brzonkala audibly responded "no" twice and then attempted to leave. Morrison forced her face-up onto a bed, pushed her down by her shoulders and forcibly disrobed her. Morrison used his hands to pin her down by her elbows, pressed his knees against her legs, and forced her to submit to vaginal intercourse.³⁷

Brzonkala attempted to push Morrison off, but before she could recover, Crawford returned, exchanged places with Morrison, and forced Brzonkala to submit to vaginal intercourse by pinning down her arms and placing his knees against her legs. Morrison then exchanged places with Crawford and forced Brzonkala to submit to vaginal intercourse a third time. Neither Morrison nor Crawford used a condom.³⁸

After raping her the second time, Morrison said to Brzonkala, "You better not have any fucking diseases."³⁹ Sometime after this, Morrison announced publicly in the dormitory's dining hall and in the presence of at least one

³⁶ *Brzonkala* 935 F. Supp. at 781-82.

³⁷ *Id.* at 782.

³⁸ *Id.*

³⁹ *Id.* at 784.

female student, "I like to get girls drunk and fuck the shit out of them." In February 1995, Brzonkala recognized Morrison and Crawford as the two men who had raped her.⁴⁰

In April 1995, Brzonkala filed a complaint against the two men under VPI's Sexual Assault policy. After a hearing, the VPI judicial committee found Morrison guilty of sexual assault and suspended him from school for two semesters. The committee found the evidence against Crawford insufficient to take action.⁴¹ After a second hearing and an appeal, Morrison's suspension was set aside and he returned to VPI for the Fall 1995 semester. VPI failed to notify Brzonkala of his impending return; she learned of the result through a newspaper article. Fearing that Morrison's return to campus would jeopardize her personal safety, Brzonkala canceled her plans to return to VPI for the Fall semester.⁴²

In March 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,⁴³ Title III of VAWA,⁴⁴ and various state laws. Claims were brought against VPI, William Landside in his capacity as Comptroller of the Commonwealth, and three VPI football players: Antonio Morrison, James Crawford and Cornell Brown. The claims against VPI, Landside and Brown were dismissed.⁴⁵ The court only considered the VAWA claim and some state law claims against Morrison and Crawford.⁴⁶

B. *The Decision*

1. The Sufficiency of Brzonkala's Claim

The court first considered whether the complaint sufficiently stated a claim under the standard of Fed. R. Civ. P. 12(b)(6). In terms of the VAWA claim, this sufficiency was measured by whether Brzonkala had adequately alleged that

⁴⁰ *Id.* at 782.

⁴¹ *Brzonkala*, 935 F. Supp. at 782.

⁴² *Id.*

⁴³ 29 U.S.C. § 1681 (1994).

⁴⁴ 42 U.S.C. § 13981 (1994).

⁴⁵ *Brzonkala*, 935 F. Supp. at 781.

⁴⁶ *Id.*

her rape was a "crime of violence motivated by gender."⁴⁷ In finding that Brzonkala's complaint sufficiently stated a claim, the court relied on general guidelines for identifying hate crimes, such as: 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 robbery, for example); common sense. . . ."⁴⁸ The court found that "gender animus more likely played a part in these rapes than in some other types of rape."⁴⁹

In reaching this decision the court considered: 1) this was a gang rape—indicating a conspiracy of disrespect for the woman; 2) this was stranger rape—indicating disrespect solely on the basis of being a woman, as the perpetrators had no knowledge of her personality; and 3) the comments made by Morrison immediately after the rape and some time after—further evidencing his disrespect for Brzonkala, and women in general, and possibly indicating a history of similar incidents.⁵⁰ The court decided that, as against Morrison, Brzonkala had stated a claim under federal pleading's minimum requirements for violation of VAWA. As to Crawford, the court found it unnecessary to decide whether Brzonkala had stated a claim since the court's decision would render VAWA an unconstitutional exercise of Congress' Commerce Clause power regardless.⁵¹

2. Commerce Clause

Congress based its authority to enact VAWA on the Commerce Clause and Equal Protection Clause of the U.S. Constitution.⁵² The *Brzonkala* court rejected VAWA's basis in the Commerce Clause as unfounded and unconstitutional using the analysis developed by the Supreme Court in *United States v.*

⁴⁷ 42 U.S.C. § 13981(d)(1) (1994). "[T]he term crime of violence motivated by gender means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender. *Id.*

⁴⁸ *Brzonkala*, 935 F. Supp. at 784 (quoting S. Rep. No. 103-138, at 49-50).

⁴⁹ *Id.*

⁵⁰ *Id.* at 784-85. See *supra* notes 39-40 and accompanying text.

⁵¹ *Id.* at 785. The court did not state the rationale for its distinction between *Morrison* and *Crawford*. *Id.*

⁵² 42 U.S.C. § 13981(a) (1994). See *supra* note 10. This Comment will not address the equal protection issue.

Lopez.⁵³ The *Lopez* Court found that Congress, under its commerce power, may regulate three broadly defined categories of activity, 1) "the use of the channels of interstate commerce"; 2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and 3) "those activities having a substantial relation to interstate commerce."⁵⁴ In *Lopez*, the Court concluded that, in order to qualify for the third category, the regulated activity must "substantially affect" interstate commerce.⁵⁵

The court eliminated the first two categories almost immediately and focused on applying the *Lopez* analysis of substantial effect on interstate commerce to the facts of Ms. Brzonkala's claim.⁵⁶ The court found the differences between the two cases to be insignificant and the similarities to be controlling.⁵⁷ The similarities identified by the court included: "(1) the criminal nature of both statutes, (2) the non-commercial nature of both statutes, (3) the lack of a jurisdictional requirement that some effect on interstate commerce is involved in each case, (4) the remoteness of any effect on commerce, and (5) the excessive congressional power that would logically follow from permitting both statutes based on the Commerce Clause."⁵⁸ Therefore, the court treated the statute at issue in *Brzonkala* as indistinguishable from the one at issue in *Lopez* for purposes of deciding its constitutionality.

The district court's reading of *Lopez* concluded that Commerce Clause analysis is now divided between situations where regulated intrastate activity is economic in nature and situa-

⁵³ U.S. v. *Lopez*, 514 U.S. 549 (1995). See *infra* notes 86-104 and accompanying text.

⁵⁴ *Id.* at 558-59.

⁵⁵ *Brzonkala*, 935 F. Supp. at 786 (citing *United States v. Lopez*, 514 U.S. 549, 557-60 (1995)).

⁵⁶ *Brzonkala*, 935 F. Supp. at 786. The court, in saying that VAWA does not fit in either of the first two categories, limited its analysis to the following: "[a]dmittedly women often travel between states, as do their abusers and assailants, but certainly more is required to qualify for the commerce power." *Id.* Certainly one could formulate arguments to support the inclusion of VAWA in either of these two categories (e.g., women are often forced to travel interstate to flee abuse or are restricted from traveling by their abuser), but this Comment will focus on the "substantial effect" category.

⁵⁷ *Id.* at 789.

⁵⁸ *Id.*

tions where it is not. "After *Lopez*, cases such as *Wickard* [*v. Filburn*],⁵⁹ where regulated intrastate activity is economic in nature, do not control cases where regulated intrastate activity is not economic. At the least, after *Lopez*, whether intrastate activity is economic in nature is a very relevant consideration."⁶⁰ The district court concluded that "a reasonable adherence" to the *Lopez* decision shows that Congress exceeded its Commerce Clause Power in enacting VAWA.⁶¹

III. THE SUPREME COURT'S COMMERCE CLAUSE JURISPRUDENCE

A. *Economic Activities and the Commerce Clause*

For nearly sixty years, the United States Supreme Court has upheld Congress' power to regulate activities that substantially affect interstate commerce under the Commerce Clause. Beginning in the 1930s, Congress extended its use of the Commerce Clause to pass President Franklin D. Roosevelt's New Deal reforms.⁶² In 1937, the Court upheld the National Labor Relations Act ("NLRA") under Congress' Commerce Clause power.⁶³ The Court reasoned that intrastate activities fall within Congress' power if they bear such a close and substantial relationship to commerce as to make their control essential or appropriate to protect the involved commerce from burdens or obstructions.⁶⁴ This decision was followed by *United States*

⁵⁹ See *infra* notes 67-68 and accompanying text.

⁶⁰ *Brzonkala*, 935 F. Supp. at 787.

⁶¹ *Id.* at 793. The court also addressed an equal protection issue. The court found, based on Supreme Court precedent, that the Fourteenth Amendment regulates state action only and cannot reach private conduct without some state action. *Id.* at 793-94. See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *United States v. Guest*, 383 U.S. 745 (1966). Since there was no state action connected to the private conduct in *Brzonkala*, the court found that VAWA was an unconstitutional exercise of Congress' power under the Enforcement Clause of the Fourteenth Amendment. *Id.* at 801.

⁶² Sheila A. Mikhail, *Reversing the Tide Under the Commerce Clause*, 86 J. CRIM. L. & CRIMINOLOGY 1493, 1498 (1996). After the Court initially resisted, President Roosevelt attempted to pack the Court. Subsequently, seven of the nine Supreme Court Justices retired, and the President was able to obtain approval of his New Deal legislation. *Id.*

⁶³ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

⁶⁴ *Id.* A labor organization claimed that a corporation was obstructing its employees' rights to form a union in violation of the NLRA. *Id.* at 25. This holding stemmed from the fact that the NLRA was enacted to prevent strikes, which,

*v. Darby*⁶⁵ in 1941, which upheld the Fair Labor Standards Act ("FLSA"). In *Darby*, the Court held that Congress' power over interstate commerce is not limited to regulating commerce between states. Congress' power extends to intrastate activities "which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end."⁶⁶

The "most far reaching example of Commerce Clause authority over intrastate activity"⁶⁷ was *Wickard v. Filburn*, which involved a farmer harvesting more wheat than was legally permitted under the Agricultural Adjustment Act of 1938. This harvesting was held to be subject to regulation, even though the wheat was harvested not for sale, but for the farmer's own consumption.⁶⁸ The Court stated that home-grown wheat competes with wheat in interstate commerce because "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market."⁶⁹ The Court noted that the individual effect of Filburn's actions may not have had a substantial effect on interstate commerce, but that these types of acts, taken in the aggregate, do have a substantial effect.⁷⁰ Thus, Congress' power extends to the regulation of individual acts that do not, by themselves, substantially affect commerce.

B. Civil Rights and the Commerce Clause

The Court has also upheld Congress' ability to enact civil rights statutes under the Commerce Clause power. In *Heart of Atlanta Motel*,⁷¹ the Court upheld Title II of the Civil Rights

if not prevented, could potentially cause the disruption or closing of the corporation's mines, warehouses and steamships located in other states. *Id.* at 33-36, 41-42.

⁶⁵ 312 U.S. 100, 118 (1941).

⁶⁶ *United States v. Darby*, 312 U.S. 100, 118 (1941). The federal government had indicted Darby for transporting lumber interstate since it was produced by workers that were paid less than the minimum wage prescribed by the FLSA or had worked more than the prescribed maximum hour limit. *Id.* at 111.

⁶⁷ *United States v. Lopez*, 514 U.S. 549, 560 (1995).

⁶⁸ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁶⁹ *Id.* at 128.

⁷⁰ *Id.* at 127-28.

⁷¹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

Act of 1964⁷² as applied to a motel which refused to accommodate people on the basis of race. The Court concluded that racial discrimination adversely affected interstate commerce by impeding interstate travel.⁷³ Congress was not restricted from enacting this legislation even though it primarily regulated what was also deemed to be a social and moral wrong.⁷⁴ The social and moral ends of this legislation did not detract from the adverse effects of racial discrimination on interstate commerce.

Even if the operation of a motel may be considered an intrastate activity, the Court concluded, "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."⁷⁵ Therefore, Congress' power to protect and promote interstate commerce includes "the power to regulate local incidents thereof, . . . which might have a substantial and harmful effect upon that commerce."⁷⁶ To this end the Court deferred to congressional judgment since Congress had a rational basis for finding that racial discrimination by motels affected commerce and the means selected to eliminate the discrimination were reasonable and appropriate.⁷⁷

In *Katzenbach v. McClung*,⁷⁸ the Court similarly upheld an application of Title II to Ollie's Barbecue, a small, local restaurant in Birmingham, Alabama. Using the reasoning employed in *Wickard*, the Court found that although the value of food purchased solely by Ollie's Barbecue that traveled in interstate commerce was insignificant, the restaurant's discriminatory conduct was representative of establishments throughout the country. Aggregated, this conduct had a sub-

⁷² Pub. L. No. 88-352, 78 Stat. 241, 243-46 (1964) (codified as amended at 42 U.S.C. §§ 2000(a)-2000(b) (1988) (providing for injunctive relief for discrimination or segregation on the ground of race, color, religion or national origin in places of public accommodation)).

⁷³ *Heart of Atlanta Motel*, 379 U.S. at 253. Interstate travel is not only displeasurable and inconvenient when one is uncertain of obtaining lodging, it is often made virtually impossible. *Id.*

⁷⁴ *Id.* at 257.

⁷⁵ *Id.* at 258 (quoting *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 464, 464 (1949)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 258, 261-62.

⁷⁸ 379 U.S. 294 (1964).

stantial effect on interstate commerce since restaurants sold and ultimately bought less interstate goods because of the discrimination.⁷⁹ The Court again deferred to congressional judgment, holding that all that was necessary to uphold the statute was a rational basis to find that racial discrimination adversely affected the free flow of interstate commerce.⁸⁰

C. *Legislative Deference/Rational Basis*

Although the Court has often deferred to legislative judgment in Commerce Clause cases, *Perez v. United States*⁸¹ marked the most extreme example of such deference. There, the Court held that Title II of the Consumer Credit Protection Act,⁸² which made extortionate credit transactions a federal crime, was a valid exercise of Congress' Commerce Clause power. The Court reasoned that these transactions, known as "loan sharking," accounted for a substantial portion of the income of organized crime syndicates, many of which operated interstate.⁸³ Congress found that even where these transactions were purely intrastate, they nevertheless directly affected interstate commerce.⁸⁴ Thus, "under the statute . . . a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce."⁸⁵ Yet, Congress may still regulate pursuant to its Commerce Clause power.

These cases demonstrate Congress' extensive power to legislate in areas as various as labor relations, civil rights and criminal law. The Court has deferred to congressional judgment upon recognizing that Congress has a rational basis for finding that the activity being regulated, either alone or in the

⁷⁹ *Id.* at 300-01.

⁸⁰ *Id.* at 304.

⁸¹ 402 U.S. 146 (1971).

⁸² Pub. L. No. 90-321, 82 Stat. 146, 159-64 (1968) (codified as amended at 18 U.S.C. §§ 891-896)).

⁸³ *Perez*, 402 U.S. at 155-57.

⁸⁴ *Id.* at 156.

⁸⁵ *Id.* at 157 (Stewart, J., dissenting).

aggregate, substantially affects interstate commerce. This view prevailed for almost sixty years until the *Lopez* decision in 1995.⁸⁶

D. *United States v. Lopez*⁸⁷

In *United States v. Lopez*, the Supreme Court, in a five-four decision, diverged from decades of Commerce Clause jurisprudence when it struck down the Gun-Free School Zones Act of 1990, which was enacted under Congress' Commerce Clause power. The Gun-Free School Zones Act made it a federal offense to knowingly possess a firearm at a place known or reasonably believed to be a school zone.⁸⁸ The Court held that the Act exceeded Congress' Commerce Clause power since it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."⁸⁹

Chief Justice Rehnquist, writing for the majority, first recounted the Court's Commerce Clause jurisprudence, and then identified the three broad categories of activity that may be regulated by Congress under its commerce power.⁹⁰ The Court disposed of the first two categories and determined that to sustain the Gun-Free School Zones Act, it must be under the third category, regulation of an activity that substantially affects interstate commerce.⁹¹ The Court then characterized its prior Commerce Clause decisions as upholding congressional Acts which regulate "intrastate *economic* activity that substantially affects interstate commerce."⁹²

⁸⁶ 514 U.S. 549 (1995).

⁸⁷ *Id.*

⁸⁸ 18 U.S.C. § 922(q)(1)(A) (1988).

⁸⁹ *Lopez*, 514 U.S. at 551.

⁹⁰ *Id.* at 558-59. See *supra* note 54 and accompanying text.

⁹¹ Without any discussion or analysis, the Court concluded "§ 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce." *Id.* at 559.

⁹² *Id.* (emphasis added). The Court further stated, "the pattern is clear. Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* (emphasis added). Significantly, this pattern had never before been articulated or put into this light by any of the Court's prior

The Court went on to distinguish *Lopez* from these "economic" decisions which upheld prior Acts under the Commerce Clause rationale. Specifically, the Supreme Court stated that the Gun-Free School Zones Act:

is 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 It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.⁹³

Next, the Court noted that the Gun-Free School Zones Act contains no jurisdictional element which would ensure, on a case-by-case basis, that the gun possession prohibited by the Act would affect interstate commerce.⁹⁴

The Court then considered legislative history. The Government conceded that there were no express Congressional findings demonstrating the effects on interstate commerce of firearm possession in a school zone on interstate commerce.⁹⁵ Since there was no legislative history, the Court followed precedent in stating that Congress is not required to make particularized findings as to the substantial effects that an activity has on interstate commerce.⁹⁶ However, the Court noted that, to the extent that legislative findings would allow the evaluation of whether the regulated activity substantially affected interstate commerce, even though such an effect was not visible to the naked eye, legislative findings were lacking in this case.⁹⁷

Finally, the Court considered the Government's argument that possession of a firearm in a school zone substantially affects interstate commerce. It was argued that the possession of a firearm may result in violent crime, that the costs of violent crime are substantial, and that these costs are then spread throughout the population through insurance.⁹⁸ The Government also claimed that violent crime reduces people's willing-

decisions.

⁹³ *Id.* at 561.

⁹⁴ *Id.*

⁹⁵ *Id.* at 562 (citing Brief for the United States 5-6).

⁹⁶ *Id.* See *McClung*, 379 U.S. at 304. See also *Perez*, 402 U.S. at 156.

⁹⁷ *Lopez*, 514 U.S. at 563.

⁹⁸ *Id.* at 563-64.

ness to travel to perceived unsafe areas.⁹⁹ Additionally, the presence of guns in schools handicaps the educational process, resulting in a less productive citizenry, which will have an adverse effect on the nation's economic health.¹⁰⁰ These factors, the Government contended, could result in Congress rationally concluding that the Gun-Free School Zones Act substantially affects interstate commerce.¹⁰¹

The Court disagreed. According to the Court, under the Government's reasoning, "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, . . . Congress could regulate any activity that it found was related to the economic productivity of individual citizens"¹⁰² Therefore, it could not imagine any activity by an individual that Congress could not regulate.¹⁰³

The Court concluded that to uphold Congress' power to legislate in this area, 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."¹⁰⁴

IV. ANALYSIS

A. *Application of Lopez to the Brzonkala Case*

Disregarding decades of Supreme Court Commerce Clause jurisprudence, the *Brzonkala* court simply and exclusively applied the reasoning of *Lopez* to the *Brzonkala* case. Since the language and rationale of the *Brzonkala* court is essentially identical to that of the *Lopez* Court, the errors in analysis and reading of precedent are common to both cases.

The *Brzonkala* court's formalistic adoption of the *Lopez* analysis is both troubling and difficult to understand in that *Lopez* itself does not overrule the Court's previous Commerce Clause jurisprudence. In fact, the *Lopez* Court explicitly af-

⁹⁹ *Id.* at 564.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Lopez*, 514 U.S. at 564.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 567.

firms its previous cases, citing them as precedent.¹⁰⁵ For example, the Court concludes: "[T]he broad language in [prior] opinions has suggested the possibility of additional [Commerce Clause] expansion, but we decline here to proceed any further."¹⁰⁶ Lack of further expansion of Congressional power in no way suggests placing any constraints on what had previously been Congress' domain.

In the *Brzonkala* decision, the District Court strictly adhered to *Lopez* and applied a step-by-step analysis almost identical to the one used in *Lopez*.¹⁰⁷ The *Brzonkala* court misunderstood and misapplied precedent in concluding that VAWA does not regulate an economic activity and as such does not fall within the realm of Congress' Commerce Clause power. Further, the court ignored the Supreme Court's continued endorsement of Congress' use of the Commerce Clause to advance the cause of civil rights and the precedent of courts deferring to legislative judgment if there is a rational basis for finding that the regulated activity substantially affects commerce.

1. The Nature of the Regulated Activity: Economic v. Non-Economic

Contrary to the *Lopez* Court's assertion,¹⁰⁸ a careful study of the Supreme Court's jurisprudence prior to *Lopez* makes it clear that its Commerce Clause holdings were based on the *effect* that the regulated activities had on interstate commerce, not whether the activities themselves were econom-

¹⁰⁵ *Id.* at 555-59.

¹⁰⁶ *Id.* at 567.

¹⁰⁷ Before applying this analysis, however, the court dismissed as insignificant the three possible differences that could distinguish *Brzonkala* and make *Lopez*' logic inapplicable: VAWA is civil and the *Lopez* statute was criminal; there are legislative findings here but not in *Lopez*; and fewer steps of causation exist between the activity and commerce regulated by VAWA than the activity and commerce regulated in *Lopez*. *Brzonkala*, 935 F. Supp. at 789-91. The *Brzonkala* court found the following similarities to *Lopez* to be significant: the criminal nature of both statutes; the non-commercial nature of both statutes; the lack of a jurisdictional requirement that some effect on interstate commerce is involved in each case; the remoteness of any effect on commerce, and the excessive congressional power that would logically follow from permitting both statutes based on the Commerce Clause. *Id.* at 789.

¹⁰⁸ *Lopez*, 514 U.S. at 559-560.

ic or non-economic.¹⁰⁹ In fact, the *Lopez* Court never directly addressed how a non-economic activity is to be analyzed or whether regulation of a non-economic activity could ever fall under Congress' Commerce Clause power. Even though the *Brzonkala* Court was presented with a statute and subject matter completely different from *Lopez*, the court blindly mimicked the form of the *Lopez* opinion in finding VAWA to be unconstitutional.

The *Brzonkala* court stated that "of major importance is that VAWA involves intrastate activity which is not commercial or even economic in nature. Any interstate nature of VAWA is insignificant. VAWA regulates local criminal activity."¹¹⁰ This was in disregard to the Supreme Court's holding in *Perez v. United States*, where the Supreme Court, in deference to congressional judgment, found that even a purely intrastate criminal activity could have a substantial effect on interstate commerce.¹¹¹ The *Lopez* Court, by mischaracterizing precedent, distinguished cases where a statute regulates intrastate activity which is *economic* in order to find the Gun-Free School Zone Act unconstitutional. No distinction between economic and non-economic activity had ever been previously made by the Court.

The *Lopez* Court, in reviewing its Commerce Clause jurisprudence, concluded that all of its expansive readings of the Commerce Clause occurred when the activity to be regulated was economic in nature, and most prominently distinguished the *Wickard* case¹¹² from the case the court was deciding. In strict adherence, the *Brzonkala* court stated, "*Lopez* teaches that cases in which the statute at issue regulates intrastate activity which is economic in nature are analyzed differently from cases involving non-economic intrastate activity. After

¹⁰⁹ See *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹¹⁰ *Brzonkala*, 935 F. Supp. at 791.

¹¹¹ *Perez*, 402 U.S. at 155-57.

¹¹² *Lopez*, 514 U.S. at 560-61. The Court went out of its way to distinguish *Wickard*, apparently because, of all of its Commerce Clause cases, it is easiest to make an argument that the regulated activity in *Wickard* was not examined by the Court in terms of whether or not it was an economic activity, but rather in terms of its effect on interstate commerce. This Comment makes that argument.

Lopez, reliance on *Wickard* to analyze the commerce power in a case involving a non-economic intrastate activity is untenable."¹¹³ However, the *Lopez* Court never said that legislation regulating a non-economic activity that substantially affects interstate commerce could never be sustained, regardless of its effects on interstate commerce. This is a broad conclusion that the *Lopez* Court itself did not reach, and in fact never seemed to contemplate.

Further, the *Lopez* Court never set down a rule to be used in distinguishing economic from non-economic activities. The Court merely stated that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹¹⁴ To illustrate, it provided examples of its previous cases, stating that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."¹¹⁵

However, the *Wickard* Court might not have agreed with this, and certainly would not agree that this economic/non-economic distinction was the basis for its holding that Congress' power reached the activity of a farmer harvesting wheat for his own use. While *Lopez* attempts to distinguish *Wickard* by claiming that it concerned regulation of an economic activity, there is doubt as to whether this activity (harvesting of wheat) is truly an economic one, as there is with any activity in our highly interconnected and commercialized society. For, according to the *Wickard* Court, "[e]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature be reached by Congress if it exerts a substantial economic effect on interstate commerce."¹¹⁶ The *Wickard* Court's holding was clearly based on the *effect* of the

¹¹³ *Brzonkala*, 935 F. Supp. at 791.

¹¹⁴ *Lopez*, 514 U.S. at 560.

¹¹⁵ *Id.*

¹¹⁶ *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Ironically, the *Lopez* Court quoted this same passage, and nevertheless distinguished *Wickard* as a case involving economic activity. See *Lopez*, 514 U.S. at 556.

activity on interstate commerce, not whether it was economic in nature. Thus, while claiming that it was distinguishable, the *Lopez* Court explicitly affirmed its decision in *Wickard*.¹¹⁷

In addition to *Wickard*, the *Lopez* Court, while explicitly affirming its modern Commerce Clause cases, also distinguished several of its most prominent Commerce Clause decisions as involving congressional acts regulating intrastate economic activity.¹¹⁸ The *Brzonkala* court, like the *Lopez* Court, cited these cases to support its analysis of a purportedly non-economic activity whose regulation cannot be upheld under the Court's Commerce Clause jurisprudence.¹¹⁹

It is arguable as to whether all of these cases involved the regulation of an economic activity. Certainly, the civil rights cases did not base their holdings on an economic activity; the activity to be regulated was racial discrimination. The presentation of economic issues was used merely to support the fact that Congress had a rational basis for concluding that these activities had a substantial effect on interstate commerce.¹²⁰

Similarly, *Perez* involved a regulation of a criminal act, "loan sharking," because of its effect on interstate commerce, not because money was involved in the criminal activity.¹²¹ However, regulation of a criminal activity was exactly how the *Lopez* Court found the Gun-Free School Zones Act to be distin-

¹¹⁷ *Lopez*, 514 U.S. at 560-61.

¹¹⁸ *Id.* at 559.

¹¹⁹ *Brzonkala*, 935 F. Supp. at 792 (citing *Lopez* 514 U.S. at 559). The cases cited were: *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (involving intrastate coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (involving intrastate extortionate credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (involving a restaurant refusing to serve people on the basis of their race); and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (involving a motel refusing guests on the basis of their race).

¹²⁰ See *Katzenbach v. McClung*, 379 U.S. 294 (1964); see also *Heart of Atlanta Motel*, 379 U.S. at 241. The *Brzonkala* court next noted that similar to § 922(q) in *Lopez*, "VAWA does not have a jurisdictional requirement limiting each individual case under VAWA to situations involving interstate commerce." *Brzonkala*, 935 F. Supp. at 792. The court then incorporated this into its analysis as the *Lopez* Court seemed to do. However, the *Lopez* Court did not view this as a necessity, it described the jurisdictional element as "ensur[ing], through case-by-case inquiry, that the [activity] in question affects interstate commerce." *Lopez*, 514 U.S. at 561. Only one case, the *Bass* case, is cited by the *Lopez* court as an example of including this jurisdictional element. *United States v. Bass*, 404 U.S. 336 (1971). Surely if this element was necessary to protect against constitutional infirmity, the Court would have emphasized it further and provided more than one example.

¹²¹ *Perez*, 402 U.S. at 146. See *supra* notes 81-85 and accompanying text.

guishable from regulations it had upheld under the Commerce Clause in previous decisions.¹²² These decisions, especially *Perez*, are clearly irreconcilable with *Lopez* and reveal its convoluted reasoning. Neither the *Lopez* Court nor the *Brzonkala* court addressed this issue.

2. Civil Rights and the Commerce Clause

The Supreme Court has long permitted Congress' endeavors to promote civil rights using its Commerce Clause power, as long as there is a rational basis for the legislation.¹²³ The *Lopez* Court did not reject or alter this analysis. Therefore, it is surprising that the *Brzonkala* court failed to acknowledge the Civil Rights implications of VAWA. VAWA was passed as a civil rights statute.¹²⁴ By not acknowledging the civil rights issue, the *Brzonkala* court ignored two prominent civil rights cases decided by the Supreme Court. These decisions allowed Congress to legislate against discrimination on the basis of race based on the power provided to Congress by the Commerce Clause.¹²⁵ The *Brzonkala* court, mimicking the *Lopez* Court, grouped these cases together with the cases claimed to have been decided on the basis of the economic nature of the activity involved.¹²⁶ However, in both of these cases the activity to be regulated was racial discrimination, not an economic activity.

In *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court upheld the Civil Rights Act of 1964 in which Congress used the Commerce Clause to combat racial discrimination.¹²⁷ Similarly, in *Katzenbach v. McClung*,¹²⁸ the Court

¹²² *Lopez*, 514 U.S. at 559-61. See *supra* notes 92-93 and accompanying text.

¹²³ See *McClung*, 379 U.S. at 294 (involving a restaurant refusing to serve people on the basis of their race); and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (involving a motel refusing guests on the basis of their race).

¹²⁴ See 42 U.S.C. § 13981 (1994).

¹²⁵ See *McClung*, 379 U.S. at 294; and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹²⁶ See *supra* note 119.

¹²⁷ 379 U.S. 241 at 261. See *supra* notes 71-77 and accompanying text. See also Steven Christopher Likes, Casenote, *An Utter Disregard for Precedent: Misconstruing Commerce Clause Precedent in United States v. Lopez*, 29 CREIGHTON L. REV. 811, 834 (1996).

¹²⁸ *McClung*, 379 U.S. at 294. See *supra* notes 78-80 and accompanying text.

upheld the application of the Civil Rights Act to a small, local restaurant. The Court in both cases deferred to legislative judgment, finding that there was a rational basis for finding that racial discrimination substantially affected the flow of commerce.¹²⁹ The Court used economic considerations only in reviewing that there was a rational basis for enacting the legislation.

Both *Heart of Atlanta* and *McClung* are analogous to *Brzonkala*. Under VAWA, gender-based violence is the type of discrimination being regulated. As Congress found,¹²⁹ even though these violent acts may occur completely intrastate, their ramifications are felt throughout the nation. Just as the hotel and restaurant establishments are connected to interstate commerce by their purchase of goods from out of state or their accommodation of people from out of state, gender-based violence is connected to interstate commerce by preventing women from participating in the national economy as consumers and producers. In the aggregate, violence against women has a tremendous effect on interstate commerce, and has the potential to keep one-half of the population from fully participating in the national economy.¹³¹ Why shouldn't women, who are so often targeted because of their sex, receive the same civil rights protections afforded to other groups who are also targeted due to bias?

3. Legislative Deference/Rational Basis

Importantly, in the *Brzonkala* case there existed voluminous Congressional findings that violence against women substantially affects interstate commerce.¹³² The *Brzonkala* court cited *Lopez* for the proposition that such findings are not necessary for a determination of whether a rational relation to interstate commerce exists.¹³³ This statement is taken out of context by the *Brzonkala* court. The *Lopez* Court's analysis went on to note that "congressional findings would enable [it]

¹²⁹ *Id.* at 304; *Heart of Atlanta*, 379 U.S. at 258, 261-62.

¹³⁰ See *supra* note 16.

¹³¹ See *supra* notes 12-35 and accompanying text for a more detailed explanation of Congressional findings.

¹³² See *supra* notes 12-35 and accompanying text.

¹³³ *Brzonkala*, 935 F. Supp. at 789 (citing *Lopez*, 514 U.S. at 562-63).

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."¹³⁴ Therefore, the *Brzonkala* court should have deferred to the overwhelming Congressional findings to determine the effects of violence against women on interstate commerce. Instead, the court concluded that "the fact that the effects need not be inferred in the case at hand is not a very important difference."¹³⁵ Thus, the *Brzonkala* court stated that Congressional findings do not matter since this case is just like *Lopez* and involves a non-economic activity. Where, *Lopez* left open the possibility that Congressional findings could be persuasive where the impact on commerce was not readily appreciable, the *Brzonkala* court takes it upon itself to rule out this possibility without any further explanation.

If the *Brzonkala* court had taken into account the detailed Congressional findings, it would not have to "pile inference upon inference"¹³⁶ to reach the conclusion that violence against women substantially affects interstate commerce.¹³⁷ It would have been able to engage in the rational basis test that has been the Supreme Court's hallmark for dealing with Commerce Clause cases and which was explicitly affirmed in *Lopez*.¹³⁸

¹³⁴ *Lopez*, 514 U.S. at 563.

¹³⁵ *Brzonkala*, 935 F. Supp. at 790.

¹³⁶ *Lopez*, 514 U.S. at 567. See *supra* note 104 and accompanying text.

¹³⁷ The *Brzonkala* court then considered the practical implications of sustaining VAWA. The court found that "permitting 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." *Brzonkala*, 935 F. Supp. at 792. The court expresses its understanding that this situation is similar to the one in *Lopez* where the Court came to the same conclusion. However, the statute in *Lopez* was a criminal one and effectively pre-empted the states from exercising their police powers in their own way. Here, VAWA is a civil remedy; it does not supplant any current or contemplated state regulation. It is only a supplementary remedy for the violation of one's civil rights.

¹³⁸ The *Lopez* Court acknowledged the rational basis test stating that "[s]ince [Jones & Laughlin Steel] the Court has . . . undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 557. However, this is the first and last time the rational basis test is mentioned in the majority opinion. Presumably, the rational basis test would have interfered with finding the statute in question unconstitutional, a result which seemed to be the Court's first and foremost objective.

Indeed, the Court has used a rational basis test in all of its prominent Commerce Clause cases spanning over almost sixty years.¹³⁹ In *Virginia Surface Mining & Reclamation*, the Court found that Congress had rationally determined that the regulation of surface mining is necessary to protect interstate commerce from adverse effects that may result from that activity and sustained the regulation in question.¹⁴⁰ The Court reviewed the findings set forth in the statute itself as well as Congressional reports. Had the *Brzonkala* court followed this precedent requiring "[t]he court [to] defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding,"¹⁴¹ VAWA certainly would have been found to be constitutional.

Lopez disregarded the "rational basis test," and articulated a new standard—the "economic nature of the activity test." However, the *Lopez* Court failed to address how to distinguish an economic activity from a non-economic one, or how to analyze a statute that regulates a non-economic activity. Therefore, within this context, *Lopez* provides no guidance to future courts and led the *Brzonkala* court to disregard almost sixty years of Supreme Court Commerce Clause precedent, as well as a woman's civil right to be safe from gender-based violence. As it is practically unworkable, it seems that the *Lopez* "economic nature of the activity test" is not a test at all.¹⁴² Furthermore, in the language of its own opinion, *Lopez* affirms the rational basis test and all of the cases from which it sprung.¹⁴³ The *Brzonkala* court was in error when it chose not to subject VAWA to a rational basis test. If it had, based on all of the Congressional findings, it certainly would have found that Congress had a rational basis in determining that violence against women has substantial and adverse effects on interstate commerce.

¹³⁹ See *Hodel*, 452 U.S. at 276-80; *Perez*, 402 U.S. at 155-56; *Katzenbach*, 379 U.S. at 299-301; *Heart of Atlanta Motel*, 379 U.S. at 252-53.

¹⁴⁰ *Hodel*, 452 U.S. at 281. The Court stated "[t]his congressional finding is sufficient to sustain the Act as a valid exercise of Congress' power under the Commerce Clause." *Id.*

¹⁴¹ *Id.* at 276 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964)).

¹⁴² See *supra* notes 108-122 and accompanying text.

¹⁴³ *Lopez*, 514 U.S. at 557. See *supra* note 138 and accompanying text.

CONCLUSION

The statute and subject matter at issue in the *Brzonkala* case are not adequately addressed by simply applying the same questionable analysis used by the Supreme Court in *Lopez*. To do this ignores almost sixty years of Supreme Court precedent as well as the national problem of violence against women. After careful deliberation and consideration of much evidence, Congress found violence against women to have a harmful and substantial impact on interstate commerce. The *Brzonkala* court should have, in following long established precedent, applied a rational basis test and deferred to legislative judgment in the face of voluminous Congressional findings. Had this been done, the Court certainly would have found VAWA to be a constitutional exercise of Congress' power under the Commerce Clause.

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