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DOE v. DOE AND THE VIOLENCE AGAINST WOMEN ACT: A POST-LOPEZ COMMERCE CLAUSE ANALYSIS

Historically, violence against women, particularly domestic violence,¹ has been treated as non-criminal conduct² or at best as

¹ Statistical studies of domestic violence suggest varying numbers, although all document a problem of extensive proportions. One of the most carefully researched and authoritative studies found that approximately 3.8% of all women experienced physical violence from a partner in any given year, and one out of every six wives was beaten by her husband at some point. See RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 104 (1988). Other studies also indicate the magnitude of the problem. See *State v. Huletz*, 838 P.2d 1257, 1260 n.3 (Alaska Ct. App. 1992) (citing report by Alaska's Council on Domestic Violence and Sexual Assault which indicated that over one million women seek medical treatment for battering injuries each year); EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* 8 (2d ed. 1996) (indicating that 15% of murders with known relationship involved "intimates" and that 50% of American couples have had violent incident, with female victim in 90% of incidents); LEONARD KARP & CHERYL L. KARP, *DOMESTIC TORTS* 2 (Supp. 1996) [hereinafter KARP & KARP 1996] (citing statistics showing that 16 million women are abused each year by present or former partners).

² See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *445 (stating "rule of thumb" that man could beat his wife if stick he used was "no longer than his thumb"). Historically, the common law in England permitted a man to "chastise" his wife, as long as there was no permanent injury to her. See Reva B. Siegel, "*The Rule of Love: Wife Beating as Prerogative and Privacy*," 105 *YALE L.J.* 2117, 2118 (1996) (stating that although chastisement was no longer acceptable legal theory in America by 1870s, courts have frequently condoned wife-beating). *But see Fulgham v. State*, 46 Ala. 143, 146-47 (1871) (abrogating chastisement doctrine). The common law doctrines relating to the legal identity of husband and wife, see BLACKSTONE, *supra*, at *442 ("[B]y marriage, the husband and wife are one person in law"), merge the legal identity of the wife into that of the husband, *id.* at *433; see also 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* *149 (DaCapo Press 1971) (1827) (describing doctrine in American common law), and the related doctrine of interspousal tort immunity, which barred suits between spouses, caused courts to frequently refuse to adjudicate domestic abuse cases. See LEONARD KARP & CHERYL L. KARP, *DOMESTIC TORTS* 28 (1989) [hereinafter KARP & KARP 1989]. Even when wife-beating was finally recognized as a crime, continuing interspousal tort immunity meant that a spouse could not bring a civil suit for injuries. *Id.* Although the Married Women's Property Acts gave women the right to independently file suits and collect damages for injuries, only slowly did courts allow women to file such suits against their husbands. See Siegel, *supra*, at 2162-63. Public policy justifications included maintaining domestic harmony, *id.* at 2167, marital unity, *id.* at 2166, and prevention of fraudulent collusion between spouses. See Robert J. Durst

disapproved of, private behavior. Modern American society has slowly become attentive to the problem of violence against women.³ Public recognition of the magnitude and extent of violence against women has led to fundamental changes in the understanding and characterization of such violence,⁴ and in the method of enforcement of existing criminal⁵ and civil⁶ sanctions.

II, *Emerging Tort Theories Affecting Married and Domestic Partners*, 14 No.6 FAIR\$HARE 10, 10 (1994). These legal theories also prevented women from charging their husbands with rape. See *id.* (noting that in 1981, marriage was "absolute defense to ... rape in 44 states").

³ From 1939 until 1969, no articles on family violence appeared in the *Journal of Marriage and the Family*, the most prominent family research journal in the country. See ELIZABETH PLECK, DOMESTIC TYRANNY 182 (1987) (reporting lack of public discussion of wife-beating from 1900 to 1970). The feminist movement, in the early 1970s, began to recognize the problems battered women encountered in the legal system and pressured police and policy makers to initiate reform. *Id.* at 183. These attempts mirrored those of the feminist movement of the mid-1800s. See Siegel, *supra* note 2, at 2148.

⁴ See SUSAN S.M. EDWARDS, POLICING "DOMESTIC" VIOLENCE 4, 14 (1989) (asserting that legislation affecting primarily "public" behavior has effect of marginalizing "private" behavior, including domestic violence); PLECK, *supra* note 3, at 125-38 (noting early twentieth century treatment of domestic violence as psychiatric and social work problem giving way to treatment as criminal action, and attempting reconciliation of two approaches); Siegel, *supra* note 2, at 2170 (describing use of family court system to "decriminalize marital violence"). The characterization of such violence as "domestic" or "intimate" leads to reluctance in acknowledging it as a public issue. See Elizabeth M. Schneider, *The Violence of Privacy*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 36, 37 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

⁵ See DAWN BRADLEY BERRY, THE DOMESTIC VIOLENCE SOURCEBOOK 127 (1995) (observing that almost all states enacted reform in domestic violence procedure during 1980s); N. ZOE HILTON, LEGAL RESPONSES TO WIFE ASSAULT 3 (1993) (noting increasing response of legal system to wife assault in 1980s and 1990s). A typical change involved an increase in police arrests of batterers, and the evolution of police department policies toward domestic violence. An example of the typical earlier police view was, "[t]he worst thing you can do is take sides, even if one party is dead wrong. You don't help by screaming. You can't solve their problems. You just try to calm them down. If you don't get another complaint that night, you figure you did your job." George Vescey, *'Family Quarrels' Bedevil Police*, N.Y. TIMES, Jan. 26, 1973, at 37. For a description of how earlier police forces were trained to act as mediators in cases of domestic violence and police reluctance to arrest in these situations, see Raymond I. Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914 (1967). Although the police response in these situations is partially colored by the danger and unpredictability of such situations, see *id.* at 920 n.25, official police responses have changed. In 1980, the National Organization of Police Chiefs recommended that the goal of police should be to arrest batterers, not to mediate. See BERRY, *supra*, at 132. Often, however, official changes in policy are not easily implemented at the practical, day to day level. See BUZAWA & BUZAWA, *supra* note 1, at 241 (suggesting that policies designed to change police and prosecutorial responses fail due to lack of attention at administrative level).

⁶ Beginning with *Bennett v. Bennett*, 140 So. 378, 379 (Ala. 1932), the doctrine of

Although modifications and innovations in the treatment of violence towards women by the police, prosecutorial, and state judicial systems have occurred slowly, these changes nonetheless represent significant departures from the common law⁷ and im-

interspousal tort immunity has been abrogated in most jurisdictions. See *Jones v. Pledger*, 363 F.2d 986, 989 (D.C. Cir. 1966) (allowing wrongful death action against husband); *Catlett v. Catlett*, 388 S.E.2d 14, 15 (Ga. Ct. App. 1989) (affirming punitive damages award to wife for assault and battery and false imprisonment by former husband); *Shook v. Crabb*, 281 N.W.2d 616, 620 (Iowa 1979) (asserting public policy of allowing redress for injury); *Heacock v. Heacock*, 520 N.E.2d 151, 153 (Mass. 1988) (holding that divorce did not bar civil tort action for injuries inflicted during marriage); *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338, 343-44 (W. Va. 1978) (noting that spousal immunity "permitted the wife beater to practice his twisted frustrations secure in the knowledge that he was immune from civil action except for a divorce, and that any criminal penalty would ordinarily be a modest fine").

⁷ See *supra* note 2 (discussing common law doctrines). Furthermore, in most states marriage is no longer an absolute shield against prosecution for the rape of one's wife. See *KARP & KARP* 1989, *supra* note 2, at 38; see also *Warren v. State*, 336 S.E.2d 221, 222, 225-26 (Ga. 1985) (holding that Georgia rape and aggravated sodomy statutes do not include spouse exception, and stating "rape and aggravated sodomy are not sexual acts of an ardent husband ... they are acts of violence"); *People v. M.D.*, 595 N.E.2d 702, 711 (Ill. App. Ct. 1992) (holding that marital exception for criminal sexual assault was unconstitutional violation of equal protection and due process); *People v. Liberta*, 474 N.E.2d 567, 573-76 (N.Y. 1984) (holding that marital exception to rape and sodomy statutes was unconstitutional).

Emerging tort theories also indicate a more sensitive and creative response, legislatively and judicially, on the part of states. This has included tort claims for intentional infliction of emotional distress, often in conjunction with a divorce claim. See *KARP & KARP* 1996, *supra* note 1, at 46; see also *Curtis v. Firth*, 850 P.2d 749, 755 (Idaho 1993) (applying intentional infliction of emotional distress theory to battered nonspousal partner); *Henriksen v. Cameron*, 622 A.2d 1135, 1137 (Me. 1993) (affirming judgment of damages for intentional infliction of emotional distress resulting from physical and verbal abuse); *Ruprecht v. Ruprecht*, 599 A.2d 604, 606 (N.J. Super. Ct. Ch. Div. 1991) (holding action for intentional infliction of emotional distress is available between spouses, notwithstanding absence of physical injury); *Weisman v. Weisman*, 485 N.Y.S.2d 570, 571 (App. Div. 1985) (holding husband's threats to wife's life and display of bullet gave rise to claim for intentional infliction of emotional distress); *Davis v. Bostick*, 580 P.2d 544, 547 (Or. 1978) (allowing suit for intentional infliction of emotional distress where husband threatened to kill wife); *Johnson v. Johnson*, 654 A.2d 1212, 1216 (R.I. 1995) (allowing ex-wife to bring slander cause of action against ex-husband who called her "whore" in public place); *Massey v. Massey*, 807 S.W.2d 391, 396 (Tex. Ct. App. 1991) (allowing intentional infliction of emotional distress claim even in absence of physical injury). One of the more interesting recent developments has been the treatment of claims for damages for battered woman syndrome as a continuing tort, thereby enabling the victim to sue for the entire history of abuse. See *Curtis*, 850 P.2d at 754-55 (applying continuous tort theory to ongoing abusive relationship); *Giovine v. Giovine*, 663 A.2d 109, 114-15 (N.J. Super. Ct. App. Div. 1995) (holding acts causing syndrome, not syndrome itself, continuing tort); *Cusseau v. Pickett*, 652 A.2d 789, 794 (N.J. Super. Ct. Law Div. 1994) (stating that battered woman syndrome constitutes "continuing pattern of abuse"). Battered woman syndrome increasingly is being recognized by state courts as a legitimate psychological diagnosis. Battered woman syndrome is

provements in the treatment of women victimized by violence.⁸

the development of a response by a woman to a series of beatings. Violent episodes tend to involve a tripartite cycle. Initially, there is a build-up of tension due to a series of small incidents. In the second stage, the actual battering occurs, triggered by a random incident (but in reality the culmination of the escalating threat). In the third stage, the batterer apologizes, behaves lovingly toward the woman, and often promises that the battering will not occur again. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 55-70 (1984). The development of escalating tension in the first phase creates a scenario in which the woman may reasonably believe danger is imminent at any time. Additionally, the slow build-up of tension, and the randomness of the act which ultimately results in the battering, may lead the woman to believe she can control the situation by preventing the earlier events which triggered the battery, thus giving her a false sense of control over the situation. This may be reinforced by the batterer's contrition after the event. Thus, ultimately the woman may experience violence as both constantly imminent and unpredictable. As a result of what Walker calls the "cycle of violence," battered women may develop a "learned helplessness" approach and feel incapable of taking action to protect or extricate themselves. See LENORE E. WALKER, *TERRIFYING LOVE* 49-50 (1989) [hereinafter *TERRIFYING LOVE*]. Courts have increasingly admitted evidence as to the syndrome. See *Arcoren v. United States*, 929 F.2d 1235, 1241 (8th Cir. 1991) (allowing evidence of battered woman syndrome to explain victim's recantation); *People v. Humphrey*, 921 P.2d 1, 2 (Cal. 1996) (holding evidence of battered woman syndrome relevant to determining reasonableness of woman's belief that killing husband was necessary for self defense); *State v. Kelly*, 478 A.2d 364, 378 (N.J. 1984) (allowing expert evidence regarding battered woman syndrome in claim of self-defense); *People v. Ellis*, 650 N.Y.S.2d 503, 509 (N.Y. Sup. Ct. 1996) (allowing evidence of battered woman syndrome as explanation of victim's recantation); *People v. Torres*, 488 N.Y.S.2d 358, 363 (N.Y. Crim. Ct. 1985) (same); see also *State v. Daws*, 662 N.E.2d 805, 811 (Ohio Ct. App. 1994) (allowing evidence of battered woman syndrome as victim's experience and fears were not otherwise understandable to jury).

⁸ See *supra* notes 5-7 (discussing improvements in treatment of battered women); see also BUZAWA & BUZAWA, *supra* note 1, at 100 (describing increase in mandatory arrest policies); PLECK, *supra* note 3, at 198-99 (explaining changing attitudes of police and prosecutors toward domestic violence). The changes have also been impelled, in part, by suits brought by battered women challenging current police and prosecutorial practices. See, e.g., *Nearing v. Weaver*, 670 P.2d 137, 140 (Or. 1983) (finding valid cause of action against police department for failure to enforce restraining order against father or husband). Although the Supreme Court's decision in *DeShaney v. Winnebago County*, 489 U.S. 189, 197-98 (1989) (holding that municipal social services department owed no duty of care to child abused by father even after agency investigated allegations of abuse because agency had no "special relationship" with child out of which such duty could arise), may have limited the availability of suits by battered women against police and prosecutorial offices on some theories of liability, actions based on showing a persistent pattern of domestic discrimination or based on state statutes are available. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1015-19 & nn.1344-57 (1993). As an example of judicial changes, presently all but two states allow for an ex parte temporary order of protection, which may also include provisions regarding child custody and support. See William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judi-*

Despite state progress, however, Congress enacted the Violence Against Women Act of 1994 ("VAWA"),⁹ in part due to continuing criticisms of the provision of justice in the state courts.¹⁰

VAWA's provisions include a broad array of programs to advance the treatment of women victimized by violence, ranging from funding for rape education and prevention to training for state and federal judges. One of the more far-reaching provisions of VAWA creates a new civil right in the form of freedom from gender-related violence, and provides a civil suit for damages as a federal remedy.¹¹ The civil rights remedy of VAWA was

cial Resources?, 48 RUTGERS L. REV. 1139, 1163-64 (1996).

⁹ Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.). VAWA was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. In addition to the civil rights provision which is the focus of this Comment, VAWA includes, among other things, funding for women's shelters, see 8 U.S.C. § 1154(a) (1994), funding for rape education and prevention, see 42 U.S.C. § 10418 (1994), and training for federal and state judges. See 42 U.S.C. §§ 13992 & 14001 (1994); see also Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1883 & n.24 (1996). Additionally, there is a provision making it a federal crime to cross state lines and harass, stalk, or injure one's spouse in violation of a protection order. 18 U.S.C. § 2262(a) (1994); see also Abraham Abramovsky, *Interstate Domestic Violence and Murder: Are They the Same?*, N.Y. L.J., July 12, 1996, at 3 (questioning use of federal statute in case of woman accused of murdering husband for profit).

¹⁰ See BUZAWA & BUZAWA, *supra* note 1, at 96 (indicating that violent crimes between intimates are still taken less seriously by courts, in that many misdemeanor violence cases between intimates would have been felonies if committed by stranger); David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters*, in LEGAL RESPONSES TO WIFE ASSAULT 129-30 (N. Zoe Hilton ed., 1993) (referring to research finding that overwhelming majority of arrests for domestic violence did not result in prosecution). Continuing state courtroom prejudices against women were also documented during the congressional hearings on the Violence Against Women Act (VAWA). See S. REP. NO. 102-197, at 107, 125 (1991) (containing numerous examples of sexism within state court systems occurring in trials involving violence against women).

¹¹ The statute provides, in pertinent part:

(b) Right to be free from crimes of violence. All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action. 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) of this section 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.

(d) Definitions. For purposes of this section-

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at

enacted in recognition of the reality that, like other hate crimes, many acts of violence towards women are motivated by gender bias.¹² This provision has been the subject of controversy.¹³ The chief sources of the debate center on concerns about Congress's constitutional authority for such an enactment in the wake of the Supreme Court's decision in *United States v. Lopez*,¹⁴ which held that congressional legislation enacted pursuant to the Commerce Clause¹⁵ must at least relate to an economic activity which substantially affects interstate commerce,¹⁶ and the statute's effect on the burgeoning docket of federal courts.¹⁷ Recently, in *Doe v. Doe*,¹⁸ the United States District Court of Connecticut denied a motion challenging the constitutionality of the civil remedy portion of VAWA, holding that VAWA was a "proper exercise of congressional power"¹⁹ under the Commerce Clause, and that *Lopez* required no more than the application of a rational basis test in determining constitutionality.²⁰

In *Doe*, the plaintiff brought a claim under VAWA, asserting that the defendant, her husband, deprived her of the "federal right to be free from ... alleged gender-based violence."²¹ The plaintiff sought damages for injuries allegedly caused by her husband²² between 1978 and 1995, including battered woman's

least in part, to an animus based on the victim's gender
42 U.S.C. § 13981 (1994).

¹² See Julie Goldscheid, *Will a Vital New Women's Right Be Withdrawn?*, NAT'L L.J., Aug. 26, 1996, at A20. To constitute a crime for purposes of this statute, it is not necessary that the violent act result in indictment, prosecution, or conviction. 42 U.S.C. § 13981(d)(2)(A) (1994).

¹³ See Bassler, *supra* note 8, at 1161-62 (criticizing civil rights provision as unnecessary since states are responding, while approving of other provisions as part of national campaign); Robert Jerome Glennon, *Federalism as a Regional Issue: "Get Out! and Give Us More Money,"* 38 ARIZ. L. REV. 829, 834-35 (1996) (questioning constitutionality of VAWA). *But see, e.g.,* Maloney, *supra* note 9, at 1876 (calling provision "pioneering").

¹⁴ 115 S. Ct. 1624 (1995).

¹⁵ The Commerce Clause grants Congress the power "[t]o regulate Commerce ... among the several States" U.S. CONST. art. I, § 8, cl. 3.

¹⁶ See *Lopez*, 115 S. Ct. at 1630-31. The Act made possession of a gun within 1000 feet of a school a federal crime. Gun-Free School Zones Act, 18 U.S.C. § 922(g) (1994).

¹⁷ See Bassler, *supra* note 8, at 1141-42.

¹⁸ 929 F. Supp. 608 (D. Conn. 1996).

¹⁹ *Id.* at 610.

²⁰ *Id.* at 612-13.

²¹ *Id.* at 610.

²² *Doe*, 929 F. Supp. at 610. These acts included both physical and mental abuse. Among other abuses, the plaintiff alleged that the defendant had kicked her, thrown

syndrome,²³ post-traumatic stress disorder, and depression.²⁴ The defendant made a motion to dismiss, challenging the enactment of the civil rights remedy as outside of congressional legislative authority under the Commerce Clause.²⁵

The district court denied the defendant's motion, holding that the civil rights provision of VAWA was constitutional under the Commerce Clause.²⁶ The court rejected the defendant's argument that *Lopez* overturned the rationality test²⁷ and declared that "*Lopez* reaffirmed the rationality test"²⁸ The court cited congressional findings on the relationship between gender-

objects at her, destroyed her property, and forced her to maintain "and [lay out] his clothes for his numerous dates with his many girlfriends and mistresses." *Id.*

²³ *Id.*; see TERRIFYING LOVE, *supra* note 7, at 35 (providing one doctor's definition of syndrome).

²⁴ *Doe*, 929 F. Supp. at 610.

²⁵ *Id.* Interestingly, as VAWA was passed prior to the Supreme Court decision in *United States v. Lopez*, Congress showed little concern about its powers to enact it. See S. REP. NO. 102-199, at 139-41 (1991) (stating that Commerce Clause allows Congress "to reach conduct that has even the slightest effect on interstate commerce" and that "[g]ender-based violence meets the modest threshold required"). The defendant moved to dismiss under both the Commerce Clause and the Fourteenth Amendment. *Doe*, 929 F. Supp. at 610. Although *Doe* determined that VAWA was constitutional under the Commerce Clause, it did not reach the question of whether VAWA was constitutional under the Fourteenth Amendment. This Comment will focus on the Commerce Clause, although Congress also declared its authority to enact the civil rights remedy of VAWA pursuant to the Fourteenth Amendment. See 42 U.S.C. § 13981(a) (1994). Such assertion of authority is highly problematic, however, as generally statutes enacted under the Fourteenth Amendment have been limited to proscribing state action. See *United States v. Guest*, 383 U.S. 745, 755 (1966) ("It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority."). Although section five of the Fourteenth Amendment grants relatively broad congressional powers, see *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), it is questionable whether it covers private actors. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 799-800 (W.D. Va. 1996) (holding that Congress exceeded scope of authority in enacting civil rights provision of VAWA under Fourteenth Amendment); see also Bassler, *supra* note 8, at 1170 (noting that extension of 42 U.S.C. § 1985(3) to gender discrimination or to acts not involving conspiracies is problematic).

²⁶ *Doe*, 929 F. Supp. at 617.

²⁷ *Id.* at 613.

²⁸ *Id.* Although the defendant did not argue for a heightened rational basis review, the *Doe* court also held that *Lopez* had not limited the rationality test. *Id.* The *Doe* court, however, disregarded that the Court in *Lopez* grounded its discussion of the rationality test in the necessity for the Court to determine whether an activity substantially affected interstate commerce. *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995). Significantly, the Court noted the importance of maintaining a distinction between the national and the local, and warned of the limits on Congress's Commerce Clause power. *Id.* at 1634.

motivated violence and interstate commerce.²⁹ *Lopez* was distinguished on the basis that in *Lopez*, Congress provided "only theoretical impact arguments" rather than statistical findings demonstrating a correlation.³⁰ Although noting that "the Court's inquiry is an independent one,"³¹ the court limited its role to determining whether Congress had presented data adequate to demonstrate a link between gender-related violence and interstate commerce. The court relied on the congressional findings to determine that the statute satisfied the "rational basis" test,³² stating that "because of the extensive compilation of data, testimony, and reports on which Congress based its findings, this Court is not left to speculate."³³ The court reasoned that an intrastate activity substantially affected interstate commerce if it was within the "outer-limit of Congress' authority,"³⁴ and indicated that this limit was established by the Supreme Court in *Wickard v. Filburn*.³⁵ Thus, the *Doe* court concluded that the

²⁹ *Doe*, 929 F. Supp. at 613-14. The statistics used by Congress varied from numbers referring to violence against all women, to those involving domestic violence only. Although it was stated that not all violence against women would be subsumed under the civil rights remedy, no attempt was made to parse out the percentage of violence against women due to gender animus. Thus, the extent of the effect of gender-motivated violence on interstate commerce is unknown. See *infra* note 60.

³⁰ *Doe*, 929 F. Supp. at 613.

³¹ *Id.* at 612.

³² *Id.* at 615.

³³ *Id.* at 614.

³⁴ *Id.* The court pointed to *Wickard v. Filburn*, 317 U.S. 111 (1942), as instructive of when an intrastate activity substantially affects interstate commerce. *Doe*, 929 F. Supp. at 614.

³⁵ 317 U.S. 111 (1942). *Wickard* involved a challenge by a wheat-growing farmer to a quota system under the Agriculture Adjustment Act of 1941, asserting that the application of the quota penalty to wheat grown on the farm and remaining on the farm was unconstitutional, because it did not involve interstate commerce. *Id.* at 113-14. The Supreme Court upheld the Act, noting that even local activity can "be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125. The Court in *Wickard* applied an "aggregate" theory to find that purely local activities could have a substantial effect on interstate commerce, in that the cumulative impact of such activities done by many farmers would have an effect on the interstate price of wheat. *Id.* at 127-28. The court in *Doe* analogized the cumulative impact of local activities in *Wickard* leading to a decrease in demand for wheat to the cumulative impact of gender violence limiting women's participation in the workplace and marketplace. *Doe*, 929 F. Supp. at 614. The court in *Doe*, however, failed to note that the regulation in *Wickard* was characterized by the Court in economic terms, designed to prevent fluctuations in wheat prices. *Wickard*, 317 U.S. at 115. Even after *Lopez*, such economic activities will usually meet a rational basis/substantially affects test.

congressional findings that women's fear of gender-based violence had resulted in a limited participation in the workplace and marketplace, thereby substantially affecting interstate commerce, established congressional authority under the Commerce Clause.³⁶

It is submitted that the *Doe* court erred in its analysis in several respects. First, the *Doe* court misconstrued the appropriate post-*Lopez* review for a "noneconomic" statute such as VAWA. Second, the *Doe* court, in its reliance on the *Wickard* aggregate theory, failed to distinguish between regulation of economic and noneconomic activity. Third, the *Doe* court overemphasized the importance of congressional findings, and failed to recognize that findings such as VAWA's have no logical stopping point. Part I of this Comment examines these criticisms, and suggests analyses under which VAWA would not pass constitutional muster. Part II considers the related public policy questions of federalism, intrusion on traditional state regulation and proscription of violence against women, and concerns over the increasing federal docket. The Comment concludes that the civil rights remedy of VAWA, but not its other components, creates questionable public policy.

I. APPLICATION OF *LOPEZ* TO *DOE*

From 1937 until 1994, Congress, with the support of the federal judiciary, steadily increased the scope of federal regulatory power through enactments under the Commerce Clause.³⁷ As the

³⁶ *Doe*, 929 F. Supp. at 615. Several months after the decision in *Doe*, the Western District of Virginia in *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996), dismissed a claim brought under VAWA, finding that Congress exceeded its authority under the Commerce Clause and Fourteenth Amendment by enacting VAWA. *Id.* at 801. *Brzonkala* involved a university student who brought a claim under § 13981(c), alleging that she was raped by several university football players, at least one of whom later made statements indicative of gender animus. *Id.* at 782. The court in *Brzonkala*, in dismissing the claim, noted the similarities between VAWA and the *Lopez* statute, and held that despite the provision of congressional findings, it was the court's task to provide an independent judicial review. *Id.* at 788-89. The court reasoned that the "chain of causation" depicted in the congressional findings would by analogy allow Congress to enact sweeping regulations. *Id.* at 793.

³⁷ Congress' power to regulate commerce between the states was originally established in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 240 (1824). Prior to 1937, the Supreme Court had blocked a number of New Deal statutes passed under Commerce Clause authority, as not having shown the requisite effect on interstate commerce. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down regulation

scope of subject matter which could be regulated as affecting interstate commerce broadened, the Court was extremely deferential to the legislative branch.³⁸ In 1995, however, the Supreme Court, in *Lopez v. United States*,³⁹ struck down the Gun-Free School Zones Act,⁴⁰ declaring that Congress did not have constitutional authority to pass the Act under the Commerce Clause.⁴¹ The Court noted that the statutory language of the Act made no reference to any commercial or economic activity, nor did it contain jurisdictional language which would ensure a link to interstate commerce.⁴² The Court reasoned that although economic

of miner working hours); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating regulation of interstate employment practices under National Industrial Recovery Act). Frustrated with the blocking of New Deal programs, President Roosevelt proposed his "Court-packing" plan. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 154-55 (5th ed. 1995). Due either to this threat or to worsening economic conditions, in 1937, the Supreme Court began to broaden the scope of congressional power. *Id.* at 155. Beginning with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31, 37 (1937) (allowing regulation if activity directly burdened interstate commerce), congressional power slowly expanded until the federal government controlled what seemed to be completely intrastate activity. See *Wickard*, 317 U.S. at 125 (asserting that "rational basis" test justified federal regulation of local farmer who sold all produce intrastate or used crops himself); see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981) (allowing federal regulation of strip miners on theory that states which limited mining were at unfair advantage against states that did not). By the 1960s, Congress was permitted to enact social legislation through the Commerce Clause. See *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) (upholding Title II of Civil Rights Act which prohibits racial discrimination in eating establishments); see also Michael C. Carroll & Paul R. Dehmel, Comment, *United States v. Lopez: Reevaluating Congressional Authority Under the Commerce Clause*, 69 ST. JOHN'S L. REV. 579, 590-597 (1995) (tracing development of "substantially affects" and "rational basis" tests).

³⁸ See NOWAK & ROTUNDA, *supra* note 37, at 155 (indicating that Commerce Clause has been viewed as "broad grant of power" for Congress); Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out Far Nor in Deep,"* 45 CASE W. RES. L. REV. 705, 790 (1995) (describing Supreme Court as deferring to Congress at "expense of state sovereignty"); Deborah Jones Merritt, *Reflections on United States v. Lopez: COMMERCE!*, 94 MICH. L. REV. 674, 682 (1995) (noting that rationality review is "extremely deferential" to Congress); Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1392 (1996) (same); Carroll & Dehmel, *supra* note 37, at 593 (noting broad reach of Commerce Clause); Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 168 (1995) (criticizing Supreme Court "rubber stamping" of congressional enactments).

³⁹ 115 S. Ct. 1624 (1995).

⁴⁰ 18 U.S.C. § 922(q) (1994); see *supra* note 6.

⁴¹ *Lopez*, 115 S. Ct. at 1626.

⁴² *Id.* at 1630-31. The Court reaffirmed the three categories of activities which Congress can regulate under the Commerce Clause: channels of interstate com-

activities which have a substantial affect on interstate commerce can be regulated, possession of a gun near a school zone does not involve economic activity.⁴³ Additionally, although the Court did not hold that noneconomic activity could never be regulated under the Commerce Clause,⁴⁴ the Court did envision that under the government's "cost of crime" and "national productivity" arguments the potential reach of the Commerce Clause would be limitless.⁴⁵ Thus, in analyzing whether a noneconomic statute substantially affects interstate commerce, courts must heed the warning of *Lopez* that arguments which theoretically could give Congress unbounded power to regulate are untenable.⁴⁶

The meaning of *Lopez* has captivated commentators and led to varying predictions of its significance.⁴⁷ At the very least, however, as a statute which regulates noneconomic activity, VAWA is precisely the type of law which should receive the heightened judicial review demanded by *Lopez*. The *Doe* court failed in this regard by applying a deferential, lower level of

merce, instrumentalities of interstate commerce, and activities which "substantially affect" interstate commerce. *Id.* at 1629-30. In setting forth the last category, the Supreme Court rectified previous case language ambiguity and asserted that regulated activities must meet the "substantially affects" test. *Id.*; see also Carroll & Dehmel, *supra* note 37, at 599.

⁴³ *Lopez*, 115 S. Ct. at 1630. The Court noted that although drawing a line between commercial and noncommercial activities is at times uncertain, such uncertainty is inherent in a system where limits are set on congressional powers. *Id.* at 1633. For a discussion of the application of "fuzzy logic" concepts (i.e., human reasoning defines classes in terms of representative and less-representative members, creating classes that are not "crisp") and the question of how "commerce-like" an activity is, see Merritt, *supra* note 38, at 738-50.

⁴⁴ See Maloney, *supra* note 9, at 1919-20 (indicating that *Lopez* Court did not assert that *only* economic activity can be constitutionally regulated).

⁴⁵ *Lopez*, 115 S. Ct. at 1632. The "cost of crime" argument indicated that possession of a gun might lead to violent crime, and violent crime affected the economy through its own costs and by reducing travel. *Id.* The "national productivity" argument suggested that guns near schools hampered education and ultimately produced less productive citizens. *Id.*

⁴⁶ *Id.* "Thus, if 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." *Id.*; see also *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 792-98 (W.D. Va. 1996) (noting use of similar arguments would lead to unbounded congressional powers); Merritt, *supra* note 38, at 677 (reasoning that *Lopez* proposes that "rationale[] for congressional regulation must recognize some bounds on federal power").

⁴⁷ Compare, e.g., Merritt, *supra* note 38, at 738-39 (characterizing *Lopez* as "limited decision" which will not be significantly extended by Court), with Carroll & Dehmel, *supra* note 37, at 608 (noting that *Lopez* represents "important change" in evaluation of congressional authority), and Gee, *supra* note 38, at 191 (suggesting that *Lopez* sent clear message of restraint to Congress).

scrutiny.⁴⁸ Additionally, although the provision of congressional findings for VAWA resolves one of the weaknesses addressed by the *Lopez* Court, the mere existence of congressional findings will not suffice to legitimize noneconomic statutes where, as here, such findings would extend Commerce Clause power unduly.⁴⁹

A. Proximate Cause Analysis of VAWA

Lopez did not clearly announce what form of heightened judicial review is appropriate.⁵⁰ It has been suggested, however, that the appropriate analysis for a noneconomic statute is akin to a proximate cause analysis.⁵¹ In order for a noneconomic statute to meet the "substantially affects," toughened rational basis test,⁵² there must be a relationship between the regulated activity and interstate commerce "strong enough or close enough to justify federal intervention."⁵³ This type of analysis has several

⁴⁸ Although the court in *Doe* acknowledged the independent judicial role of review, *Doe v. Doe*, 929 F. Supp. 608, 614 (D. Conn. 1996), the court's truncated analysis of VAWA essentially circumvented the proper judicial review.

⁴⁹ See Glennon, *supra* note 13, at 835 (analogizing congressional VAWA findings on effect of gender-motivated violence on interstate commerce to government's arguments in *Lopez*).

⁵⁰ *United States v. Wall*, 92 F.3d 1444, 1459 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part), *cert. denied*, 117 S. Ct. 690 (1997). "*Lopez* is unclear on the proper level of constitutional review that courts should now apply to Commerce Clause challenges." *Id.* But see Carroll & Dehmel, *supra* note 37, at 599-600 (stating that Court adopted "substantially affects" test and discarded "rational basis" test). Most courts and commentators, however, have not agreed with *Doe's* proposition that the prior rationality test is unchanged in any way. See *Wall*, 92 F.3d at 1459 (Boggs, J., concurring in part and dissenting in part) (citations omitted) (citing numerous cases and treatises on question of scope of review post-*Lopez*).

⁵¹ See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 791 (1996) (emphasizing necessity of considering "proximity of the regulated activity to commerce"); Merritt, *supra* note 38, at 679 (analogizing strength of relationship necessary between activity and interstate commerce to level of causation necessary to justify finding of negligence in tort law). For alternative analyses which also focus on the extent to which a statute interferes with a traditional state domain, see *Wall*, 92 F.3d at 1455 (Boggs, J., concurring in part and dissenting in part) (limiting congressional authority to activities closely linked to commerce); Stephen R. McAllister, *Controversial Decisions of the 1994-95 Supreme Court Term: Lopez Has Some Merit*, 5 KAN. J.L. & PUB. POL'Y 9, 11 (1996) (espousing that proper test is to examine intrusion into States' domain). The Court in *Lopez* indicated that the question of causation "is necessarily one of degree." *Lopez*, 115 S. Ct. at 1633 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

⁵² See Merritt, *supra* note 38, at 677 (describing *Lopez* as reducing judicial deference through "toughened rational basis standard").

⁵³ *Id.* at 679.

advantages. First, it serves as a reminder that there must be some limits on Congress' power, otherwise, the mere provision of congressional findings would suffice to allow the exercise of constitutional power under the Commerce Clause.⁵⁴ Such a result would clash with the thrust of the *Lopez* opinion.⁵⁵ Second, a proximate cause analysis also provides a consistent and principled basis for determining how to analyze Congress's power to enact noneconomic statutes under the Commerce Clause.⁵⁶ Finally, it provides limits consistent with public policy concerns of the appropriate balance between federal and state powers.⁵⁷ The closer a legislated activity is to one traditionally reserved to the states, the "tighter" the cause-effect relationship between the activity and interstate commerce will have to be.

Under such an analysis, the civil rights remedy of VAWA is problematic because it impinges upon and intersects with areas traditionally reserved to the states, including tort actions, divorce, domestic violence, and general criminal matters.⁵⁸ Therefore, under *Lopez*, a very tight link between gender-related violence and interstate commerce should have to be shown. Nevertheless, the court in *Doe* applied a traditional rational basis test and held that the congressional findings demonstrated the necessary substantial effect.⁵⁹ The congressional hearings

⁵⁴ *Brzonkala*, 935 F. Supp. at 792-93 ("If such a chain of causation [showing an effect on the national economy] sufficed, Congress's power would extend to an unbounded extreme.").

⁵⁵ See *Lopez*, 115 S. Ct. at 1634; *Wall*, 92 F.3d at 1462-63 (Boggs, J., concurring in part and dissenting in part) (requiring rationales for regulation to have "logical stopping point").

⁵⁶ Under a proximate cause analysis, a balancing and weighing process can take place, during which issues such as the economic or noneconomic nature of the statute, the level of intrusion on the domain of the states, and considerations of federalism can be addressed.

⁵⁷ See *infra* notes 83-99 and accompanying text. It is likely that there will often be some correlation between the extent to which the statute intrudes into traditional state domain and its "distance," in proximate cause terms, from interstate commerce.

⁵⁸ See Bassler, *supra* note 8, at 1141-42 (questioning need for federalizing area traditionally left to states); McAllister, *supra* note 51, at 12 (noting strong tradition of domestic violence issues exclusively within domain of states).

⁵⁹ *Doe v. Doe*, 929 F. Supp. 608, 613-14 (D. Conn. 1996). The Court in *Lopez* ultimately did not apply the rational basis test to the statute at issue. Rather, the Court's holding is grounded in concerns about the overreaching of Congress. See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 799 (1996) (finding that although Court did not disavow rational basis test in *Lopez*, Court did not utilize test in its analysis, nor did Justice Kennedy mention test in concurrence); cf. Carroll & Dehmel, *supra* note 37, at 599-600 (positing that

did not parse out, however, either "qualitatively [or] quantitatively," the effects of gender-related violence on interstate commerce, as opposed to the effects of all violent acts toward women.⁶⁰

Additionally, the suggested links between violence against women and interstate commerce could apply equally well to any violent behavior. For example, suggestions that women are less likely to go out in the evening to movies, or to travel interstate because of fear of violence,⁶¹ could be asserted of violence against any subgroup of the population or of the population as a whole.⁶² It was exactly this sort of analysis in Justice Breyer's dissent in *Lopez*—linking gun possession near schools to interstate commerce through its deleterious effect on children's ability to learn⁶³—which the majority in *Lopez* rejected, noting that such

Court in *Lopez* abandoned rational basis test in favor of substantially affects test).

⁶⁰ Thus, the 1991 Senate Report cited statistics showing, for example, that one-third of all murdered women were killed by their present or former boyfriends or husbands, see S. REP. NO. 102-197, at 38 (1991), and noted that "[s]tate remedies are inadequate to fight bias crimes against women." *Id.* at 41. The report further noted that 50% of women do not use public transit after dark and 75% of women do not go to the movies alone after dark due to fear of rape. *Id.* The Senate utilized these numbers to assert an effect on interstate commerce. At the same time, however, the report notes that the civil rights remedy will not cover "random muggings or beatings in the home or elsewhere," *id.* at 48, and that the "plaintiff must prove that the crime of violence—whether an assault, a kidnapping, or a rape—was motivated by gender," *id.* at 49, thus suggesting that not all rapes would be considered "gender-motivated." In discussing how to determine whether an attack was gender-motivated, the report uses the rather unhelpful example of a serial rapist who "hurls misogynist slurs" as he rapes. *Id.* at 50. Although presumably gender-motivated violence extends beyond this example, the report does not attempt to determine what percentage of violence against women is gender-related. Alternative theoretical analyses based on violence against women as power-related or, in the case of domestic violence, as related to systemic violence within the family, are possible. See Patrick Letellier, *Gay and Bisexual Male Domestic Violence Victimization*, in 1 DOMESTIC PARTNER ABUSE 3-7 (L. Kevin Hamberger & Claire Renzetti, eds., 1996) (criticizing overemphasis on gender explanations and stressing need for social and psychological theories to explain same-sex battering). Generally, other articles supporting the constitutionality of the civil rights remedy also point to the magnitude of the effect of violence against women on the national economy. See, e.g., Maloney, *supra* note 9, at 1878-83 & nn.9-22. Again, the extent to which the documented violence is gender-related is not specified.

⁶¹ Doe v. Doe, 929 F. Supp. 608, 613-14 (D. Conn. 1996).

⁶² See Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 792-93 (W.D. Va. 1996) (noting that such argument could be used to extend commerce power unreasonably broadly).

⁶³ United States v. Lopez, 115 S. Ct. 1624, 1659-61 (1995) (Breyer, J., dissenting). Justice Breyer linked violence in schools to the school dropout rate and the quality of education in inner-city schools, and described education as "inextricably

analysis would allow direct regulation of education and family law.⁶⁴

B. Cumulative Impact / Aggregate Theory

After utilizing a rational basis test, the court in *Doe* focused on the "repetitive nationwide impact" of gender-motivated violence on the national economy.⁶⁵ The court analogized VAWA to the statute upheld in *Wickard v. Filburn*⁶⁶ in determining that VAWA met the "substantially affects" test, thus using an aggregate theory focusing on the cumulative impact of local activities on interstate commerce.⁶⁷ The *Lopez* Court distinguished the statute at issue in *Wickard* from the Gun-Free School Zones Act, however, by classifying *Wickard* as an instance of federal regulation of an economic activity.⁶⁸ The Court in *Lopez* noted that the regulation in *Wickard* was directed at the economic activity of limiting the market price of wheat. Thus, even intrastate activity, such as home production and consumption of wheat, which affects the national market price could be regulated constitutionally under the Commerce Clause.⁶⁹ Those seeking to extend Congress's permissible level of control when regulating economic activity to the regulation of noneconomic activity, such as the Gun-Free School Zones Act and VAWA, fail to recognize that economic and noneconomic statutes should be scrutinized differently.⁷⁰

intertwined" with the economy. *Id.* at 1659-60 (Breyer, J., dissenting).

⁶⁴ *Id.* at 1633 ("Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial.").

⁶⁵ *Doe*, 929 F. Supp. at 614.

⁶⁶ 317 U.S. 111 (1942); see *supra* note 35 and accompanying text for discussion of case.

⁶⁷ *Doe*, 929 F. Supp. at 614.

⁶⁸ *Lopez*, 115 S. Ct. at 1630. The Court described *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Id.*

⁶⁹ *Id.*; see also *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 791 (W.D. Va. 1996) (arguing that *Doe's* reliance on *Wickard* to analyze "non-economic [sic] intrastate activity is not tenable").

⁷⁰ *Lopez*, 115 S. Ct. at 1634 ("The 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."); see also *Brzonkala*, 935 F. Supp. at 791-92 (finding economic-noneconomic distinction); Althouse, *supra* note 59, at 818 (using aggregate theory only when instances of violence interact between states; thus gun violence is local because instances of violence in one state do not contribute to problem in another state). It has been suggested that because some noneconomic activities which are related to economic activities might be regulated, VAWA, which might "free [business] operation[s] from the adverse effects of discriminatory gen-

The distinction between economic activity and noneconomic activity, and the noneconomic nature of the regulated activity at issue, were highlighted by the *Lopez* Court.⁷¹ While the Supreme Court did not declare that noneconomic activity could never be regulated under the Commerce Clause,⁷² statutes regarding such activities should receive closer scrutiny. Although the economic-noneconomic distinction is not a bright-line,⁷³ those statutes which do not regulate clearly commercial activity, have no evident commercial nexus, and concern traditionally state-regulated activities, should have some clear, important link to interstate commerce.⁷⁴ The level of scrutiny the *Doe* court gave to VAWA, which is an example of just such a statute, did not demonstrate such sufficient linkage.

der-based violence," could be viewed as "regulating business," analogous with *Katzenbach v. McClung*, 379 U.S. 294 (1964) (allowing regulation banning racial discrimination in restaurants), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding regulation banning racial discrimination in hotels). Maloney, *supra* note 9, at 1916-17. There are problems, however, with this analysis. First, the challenged statutes in *Katzenbach* and *Heart of Atlanta* regulated the establishments in question, and thus were directly related to business practices, whereas VAWA provides a civil rights remedy for injuries, but does not regulate businesses themselves. Second, such a characterization of VAWA would ultimately allow any noneconomic statute to be "hooked" onto business activity, thus logically allowing unlimited regulation. Third, *Katzenbach* and *Heart of Atlanta* must be viewed in the context of their times, as decisions made in a vacuum of inaction on the part of the states. See Bassler, *supra* note 8, at 1171 (contrasting inaction of states regarding racial discrimination at time of *Katzenbach* and *Heart of Atlanta* with states' present efforts to combat domestic violence). States are actively involved in improving their responses to violence against women. See *supra* notes 5-8.

⁷¹ *Lopez*, 115 S. Ct. at 1630; see also Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 706 (1996) (noting commercial-noncommercial distinction in *Lopez*); Merritt, *supra* note 38, at 695 (predicting that commercial-noncommercial distinction will be significant in post-*Lopez* Commerce Clause challenges).

⁷² See, e.g., Malcolm Stewart, *United States v. Lopez: A Governmental Perspective*, 32 IDAHO L. REV. 519, 520 (1996) (noting that *Lopez* Court did not determine noneconomic nature of statute sufficient to declare statute unconstitutional in isolation from other factors).

⁷³ See Merritt, *supra* note 38, at 747-48 (noting "fuzziness" of commercial-noncommercial distinction and suggesting activities are more or less economic).

⁷⁴ See Frickey, *supra* note 71, at 706 (noting "*Lopez* held that a regulation that is noneconomic in character may be justified, under the Commerce Clause, only when its subject matter has a significant linkage to commercial transactions of an interstate magnitude, especially if it invades a core state function"); see also Stewart, *supra* note 72, at 520 (identifying three factors of importance in *Lopez* as "non-economic [sic] character of the conduct, the fact that it was a matter traditionally regulated by the state, and the attenuated nature of the nexus").

C. Congressional Findings: Not Necessary But Sufficient?

The *Doe* court granted extreme deference to the congressional findings of VAWA.⁷⁵ Although the Supreme Court in *Lopez* referred to the absence of legislative findings on the Gun-Free School Zones Act and indicated that such findings would have been helpful in determining the relationship between gun possession and interstate commerce,⁷⁶ the Court's holding did not hinge exclusively on the absence of findings.⁷⁷ Conversely, the mere presence of findings does not guarantee congressional authority.⁷⁸ To allow findings to substitute for judicial review, rather than function as an aid to it, would ignore the expressed concerns in *Lopez* of abrogating powers traditionally reserved to the states and maintaining a federal-state balance.⁷⁹ If the mere provision of findings can validate congressional authority, theoretically there could be no limit to the powers exercised by Congress under the Commerce Clause, as it is likely that there can be a demonstration that most activities have a substantial, albeit indirect, effect on interstate commerce. Hypothetically, Congress could pass national divorce laws by presenting findings illustrating the substantial effect of divorce on interstate commerce.⁸⁰ It is highly unlikely, however, that the Supreme Court would find a Federal Divorce Act passed under the Commerce Clause an acceptable exercise of congressional power.⁸¹ Thus,

⁷⁵ *Doe*, 929 F. Supp. at 613-14.

⁷⁶ *Lopez*, 115 S. Ct. at 1631-32.

⁷⁷ *Id.* at 1631 ("We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."); see also *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993) (striking down statute entirely based on lack of findings), *aff'd*, 115 S. Ct. 1624 (1995).

⁷⁸ See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 790 (W.D. Va. 1996) (indicating that "findings are not necessary for a determination of whether a rational relation to interstate commerce exists"); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 763-64, 771-772 (1996) (citing Frickey, *supra* note 71, at 720 (positing that findings alone are insufficient because they may be standard and meaningless)).

⁷⁹ See *Brzonkala*, 935 F. Supp. at 792; Friedman, *supra* note 78, at 775, 790.

⁸⁰ See *United States v. Wall*, 92 F.3d 1444, 1471 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) ("[A] federal domestic relations law is not authorized by the Commerce Clause simply because marital beds are purchased in interstate commerce."), *cert. denied*, 117 S. Ct. 690 (1997).

⁸¹ *Lopez*, 115 S. Ct. at 1632 (arguing that "national productivity" argument could extend congressional regulation to divorce); *Ankenbrandt v. Richards*, 504 U.S. 689, 702 (1992) (affirming statutory domestic relations exception to diversity jurisdiction

proper analysis under the "substantially affects" test cannot stop at the mere provision of findings when dealing with a noneconomic statute. Rather, the court must also consider the quality of the link between the noneconomic activity and interstate commerce.⁸²

II. FEDERALISM VS. THE NEEDS OF WOMEN: STRIKING A BALANCE

The civil rights remedy of VAWA was enacted partially due to concerns about the states' responses to violence against women.⁸³ Such an intrusion into a matter of traditional state law, however, minimizes the increasingly improved response of state police, prosecutorial, and judicial systems to the problem.⁸⁴ It also discounts two major benefits of intervention at the state level: the expertise of state courts in the area,⁸⁵ and the capacity of the states to experiment with local solutions.⁸⁶ That a problem occurs nationwide does not in and of itself mandate a federal

for divorce, alimony, and child custody decrees); see also Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1789-90 (1995) (asserting importance of state regulating local activities such as divorce).

⁸² See *supra* notes 71-74 and accompanying text (discussing economic-noneconomic distinction).

⁸³ See *supra* note 10; see also Maloney, *supra* note 9, at 1883, 1885-86 (indicating that dual reasons for passage were scope of problem and inadequacy of states' response).

⁸⁴ See *supra* notes 3-8. In addition to case law, there have been statutory enactments at the state level that reflect growing state concern about domestic violence. See, e.g., Family Protection and Domestic Violence Intervention Act of 1994, 1994 N.Y. Laws §§ 2, 9 (McKinney 1995) (requiring police to inform victim in domestic dispute about services available and mandatory arrest upon request of victim). When the behavior of a batterer is recognized as criminal and procedures are enacted to support the victim throughout the prosecution process, the result is an increase in prosecutions of batterers. See Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, in WOMAN BATTERING: POLICY RESPONSES 95, 97-98 (Michael Steinman ed., 1991).

⁸⁵ See Bassler, *supra* note 8, at 1184 (noting superior skills of state courts in domestic violence area and greater extent of resources for victims in state court); Betty Levinson, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications, and Litigation Strategy*, 4 J.L. & POL'Y 401, 406 (1996) (recommending use of state court to bring VAWA action due to greater expertise of state judges in domestic violence).

⁸⁶ See Victoria Davis, Note, *A Landmark Lost: The Anemic Impact of United States v. Lopez*, 115 S. Ct. 1624 (1995), on the *Federalization of Criminal Law*, 75 NEB. L. REV. 117, 143-44 (1996) (noting virtues of states as "laboratories of experimentation" due to greater political accountability and social service resources of local officials); Gee, *supra* note 38, at 187 (emphasizing benefits of experimenting with various solutions to social problems).

level response that treads on constitutional principles.⁸⁷ Furthermore, the reach and effect of the VAWA's civil rights remedy remain to be seen. Despite complaints about deficiencies in state courts which were the impetus for VAWA's passage, a suit for damages under the civil rights action may be brought in either state or federal court.⁸⁸ The civil rights remedy may be limited to a small group able to afford the costs and withstand the delay involved in a lawsuit, may introduce difficult issues of proof,⁸⁹ and may be unnecessarily duplicative of existing state remedies.

Additionally, the VAWA's potential impact on federal courts cannot be ignored. Critics of the expanding federalization of crimes have noted the increasing burden on the federal docket.⁹⁰ Although the VAWA civil rights remedy is not a criminal provision, it is similar to federalized crimes in that it permits a large volume of actions traditionally tried in state courts to be brought in federal courts.⁹¹ Chief Justice Rehnquist has repeatedly

⁸⁷ See Althouse, *supra* note 59, at 818 (distinguishing problems which require national solutions from those which, although occurring nationwide, may be best addressed locally).

⁸⁸ VAWA § 13981(e)(3) (1994) (stating that federal and state courts have concurrent jurisdiction over actions brought under Act). If brought initially in state court, however, the action cannot be removed to federal court. Additionally, supplemental or pendant jurisdiction over marital and child custody actions is specifically barred. VAWA § 13981(e)(4). Although these provisions were amendments introduced due to concerns about the effect of § 13981 on the federal court docket and the fear that it would open the federal courthouse door to divorce proceedings, see Bassler, *supra* note 8, at 1147-48, 1154 & n.78, the amendments paradoxically reduce the availability of the federal courts to plaintiffs, which was one of the original purposes of the law. Additionally, because issues of divorce or child custody will often be intertwined with instances of domestic violence, plaintiffs will either be forced to begin separate actions in state and federal court, an expensive and wasteful procedure, or consolidate their action in state court.

⁸⁹ The plaintiff has the burden of proving by a preponderance of the evidence that the attack was motivated by gender animus. The Act specifically does not cover "random acts of violence." VAWA § 13981(e)(1). See Bassler, *supra* note 8, at 1169 (discussing how problems of proof will limit number of women who can use remedy). For a general discussion of the issues arising in determining which acts are bias crimes, see Kristin L. Taylor, Note, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575 (1996).

⁹⁰ See Bassler, *supra* note 8, at 1148-59 (noting potential effect on quality of federal courts created by already overloaded civil and criminal docket). Bassler provides statistics indicating a tripling in the district court caseload between 1960 and 1988, and an 897% increase in filings in federal courts of appeals from 1960 to 1988. *Id.* at 1151-52 & nn.63 & 67.

⁹¹ See *supra* note 88; Davis, *supra* note 86, at 142. Davis notes that civil cases frequently must wait to be heard for long periods of time because of the constraints imposed by the burgeoning federal crime docket. *Id.* at 141. This would further limit

voiced his concerns on this issue,⁹² and specifically objected to the 1990 version of VAWA on this basis.⁹³ The enacted version of the VAWA raises analogous concerns in that it provides remedies arguably duplicative of those already available in state courts.⁹⁴

The VAWA raises fundamental issues concerning federalism and the proper role of the federal and state governments in the federal system.⁹⁵ The Supreme Court's renewed concern with the proper state-federal balance is evident in *Lopez*,⁹⁶ as well as in the more recent decision in *Seminole Tribe v. Florida*,⁹⁷ which placed limits on Congress's authority to abrogate the Eleventh Amendment immunity of the states.

The gun control statute at issue in *Lopez* "federalized a local crime"⁹⁸ and thus intruded on a traditional state area. The portion of VAWA providing a federal civil rights remedy for activities that would constitute crimes at the state level, likewise creates a questionable intrusion upon a state domain. Unlike the civil rights remedy, however, those portions of VAWA which

women's access to federal courts.

⁹² See William H. Rehnquist, *1995 Year-End Report on the Federal Judiciary*, 19 AM. J. TRIAL ADVOC. 491, 494-95 (1996) (discussing problem of increasing case load); William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary*, 18 AM. J. TRIAL ADVOC. 499, 502-03 (1995) (noting "considerable sentiment" in federal judiciary "against further expansion of federal jurisdiction into areas which have been previously the province of state courts enforcing state laws").

⁹³ See Bassler, *supra* note 8, at 1148-49. Many of the initial objections of the Judicial Conference of the United States Ad Hoc Commission On Gender Based Violence, however, were resolved by amendments to the Act barring supplemental and removal jurisdiction. *Id.* at 1149, nn.45 & 46; see § 13981(e)(4) (barring supplemental jurisdiction); 28 U.S.C. § 1445(d) (1994 & Supp. 1996) (barring removal of claims brought in state court to federal district court); *supra* note 88.

⁹⁴ It can be argued, however, that the remedy is not duplicative because it provides a cause of action for gender-motivated violence often not available at the state level. Although formal state criminal charges need not have been brought in order to institute an action under VAWA, the violent act must be one which would constitute a felony under state or federal codes, except in those situations where it would constitute a felony but for the relationship of the parties involved. §§ 13981(d)(2)(A) & (d)(2)(B).

⁹⁵ See Baker, *supra* note 38, at 754 (criticizing 1994 Crime Control Act, of which VAWA is part, for assigning "a secondary role to the states, to act as grantees and agents of the congressional principal"); Davis, *supra* note 86, at 140-42 (passing VAWA by Congress was done while ignoring concerns of judiciary).

⁹⁶ 115 S. Ct. 1624 (1995).

⁹⁷ 116 S. Ct. 1114 (1996); see Nicole Veilleux, Note, *Staying Death Penalty Executions: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543, 2570 (1996) (suggesting that *Seminole Tribe* and *Lopez* indicate "recent resurgence of interest in federalism and the right of state autonomy").

⁹⁸ Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 839 (1996).

provide funding for training of police officers, improvements in the state court systems, and educational efforts would directly address the problems identified in state courts and benefit all victims of violence against women.⁹⁹ These portions provide an excellent example of how the nation's resources can be used most effectively to combat this problem.

CONCLUSION

The problem of violence against women is real and compelling, but the provision of a politically popular federal civil rights remedy as a method of combating it creates numerous problems, including an unwarranted congressional intrusion into a domain traditionally reserved to the states. Given the Supreme Court's decision in *Lopez*, the constitutionality of the civil rights remedy of VAWA as an exercise of Commerce Clause power is questionable. The *Doe* court incorrectly brushed aside serious questions of constitutionality and federalism in its rush to uphold this provision. Ultimately, the states can best be assisted in combating the problem of violence against women through those provisions of VAWA which provide funding for training and education in our state police and court systems, thereby benefiting the vast majority of women who seek help at the state level.

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⁹⁹ See Bassler, *supra* note 8, at 1160 ("By providing much needed funding in critical areas, the VAWA exemplifies 'cooperative federalism,' which combines federal funding with state enforcement powers to achieve national objectives in a flexible and decentralized manner.").

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