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Substantial Activity and Non-Economic Commerce: Toward a New Theory of the Commerce Clause

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SUBSTANTIAL ACTIVITY AND NON-ECONOMIC COMMERCE: TOWARD A NEW THEORY OF THE COMMERCE CLAUSE

Jason Everett Goldberg[*]

INTRODUCTION

The federal government was designed to be one of enumerated and limited powers.[1] One such enumerated power is Congress' ability to regulate interstate commerce under the Commerce Clause.[2] During the United States' economic expansion and societal evolution in the twentieth-century, Congress increasingly enacted legislation under the Commerce Clause to address issues that the nation's founders could never have foreseen.[3] Despite

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[1] *See* Hoffman v. Hunt, 126 F.3d 575, 582-83 (4th Cir. 1997) (explaining why the founders of the federal government wanted the national government to be one of limited and enumerated powers); Michael Peter Hatzimichalis, Note, *Sovereignty, Federalism and Property in the Balance: A Paradox in the Making*, 8 J.L. & POL'Y 707, 708 (2000) (noting that "[o]ur national government is a government of enumerated and defined powers").

[2] U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[3] Hatzimichalis, *supra* note 1, at 708 (commenting that "[t]he peaks and valleys of the exercise and definition of federal power have been influenced by countless exogenous variables: from changes to our social fabric, norms, mores, and economic plight to vogue academic and constitutional methodologies"); Margaret Lupkes, *Constitutional Law - Federal Commerce Power: Striking Down the Gun Free School Zones Act as Beyond Congressional Power;* United States v. Lopez, *115 S. Ct. 1624 (1995)*, 72 N.D. L. REV. 1081, 1083 (1996) (explaining that "[a]t the turn of the twentieth century, in response to . . . the industrialization of American society, Commerce Clause adjudication became more frequent as the amount of federal legislation increased"); Melinda M.

federalism[4] serving as a significant underlying tenet of American governmental structure,[5] for approximately six decades following the heyday of the New Deal in the 1930's,[6] Congress, without

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Renshaw, Comment, *Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act*, 47 EMORY L.J. 819, 823 (1998) (stating that "[a]s the localized, agrarian economy of the United States evolved into a national economy driven by industrial concerns, Congress passed numerous acts designed to regulate various aspects of industry, transportation, and technology").

Some commentators have criticized the federalization of various criminal activities under the Commerce Clause. *See, e.g.*, Derek A. Kurtz, Comment, *Does the Violence Against Women Act Do Violence to the Limits of Congressional Power?*, 34 SAN DIEGO L. REV. 1047, 1059 (1997) (delineating a summary of criminal statutes enacted under the Commerce Clause); H. Scott Wallace, *The Drive to Federalize Is a Road to Ruin*, 8 CRIM. JUST. 8 (1993) (criticizing the federalization of crimes for its impact on federalism and citing the civil rights provision of VAWA as one such example of this drive).

[4] *See* Dennis M. Cariello, Note, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26 FORDHAM URB. L.J. 1493, 1494 (1999) (observing that the division of power between the federal and state governments, an arrangement, "known as federalism, was the Framers' unique contribution to political science and theory"). Moreover, "[t]he central issue of federalism . . . is whether any realm is left open to the States by the Constitution - whether any area remains in which a State may act free of federal interference." *Id.* at 1493. *See also* Adam S. Halpern, Note, *New York, Printz, and the Driver's Privacy Protection Act: Has Congress Commandeered the State Departments of Motor Vehicles?*, 51 HASTINGS L.J. 231, 233 (1999) (noting that "[f]ederalism refers to the set of issues that define the balance of power between the national government and the individual state governments in the United States").

[5] *See* L. Morrow Christian, *Sovereign Immunity Cases Change Balance of Power*, New York State Bar News, Mar./Apr. 2000, at 33 (noting that "[t]he division between states' rights activists and federalists goes back to the founders"); Jennifer Lynn Crawford, Note, *America's Dark Little Secret: Challenging the Constitutionality of the Civil Rights Provision of the 1994 Violence Against Women Act*, 47 CATH. U. L. REV. 189, 198 (1997) (commenting that "the founding fathers envisioned a national government possessing distinct powers separate from those of the states") (citation omitted).

[6] *See* Karen Tichenor, Note, *The Violence Against Women Act: Continued Confusion Over the Scope of the Commerce Cause*, 18 WOMEN'S RTS. L. REP. 329, 336 (1997) (stating that "[t]o combat the Great Depression, Congress passed federal legislation based on Commerce Clause regulatory authority").

judicial interference,[7] increasingly enacted legislation under a broad interpretation of its power to regulate interstate commerce.[8] This unprecedented and unfettered ability to enact legislation seemed limitless[9] until the April 1995 Supreme Court ruling in *United States v. Lopez*.[10] This landmark decision[11] invalidated

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[7] Mitchell S. Lustig, *Rehnquist Redefines the Commerce Clause*, N.Y.L.J. Aug. 28, 2000, at A4 (noting that as the twentieth-century passed, the Supreme Court increasingly deferred to congressional judgment if Congress "determined that there was need for legislation to remedy a problem of national concern").

[8] *See, e.g.*, Bradley A. Harsch, *Brzonkala, Lopez, and the Commerce Clause Canard: A Synthesis of Commerce Clause Jurisprudence*, 29 N.M.L. REV. 321, 321 (1999) (stating that "[t]hough the constitutional structure of enumerated powers was intended to limit the scope of federal power to certain specifically-described domains, Congress has passed a number of laws under the Commerce Clause that are, at best, only tenuously related to its power to regulate interstate commerce").

[9] *See* Judi L. Lemos, *The Violence Against Women Act of 1994: Connecting Gender-Motivated Violence to Interstate Commerce*, 21 SEATTLE U. L. REV. 1251, 1255 (1998).

> Some scholars argue that Congress has long used the Commerce Clause to pass legislation beyond the authority granted by the Constitution, while others contend that Congress's commerce power is so broad that, as long as a rational basis exists to connect an activity to interstate commerce, any legislation is constitutional.

Id. (footnotes omitted).

[10] 514 U.S. 549 (1995). *Lopez* involved a case against a twelfth grade high school student in San Antonio, Texas, who was arrested for "carrying a concealed .38-caliber handgun and five bullets" into the school. *Id.* at 551. State charges were filed but subsequently dropped when respondent was charged by the federal government for violating the Gun Free School Zones Act of 1990. *Id.* The district court convicted respondent but "[t]he Court of Appeals for the Fifth Circuit . . . reversed respondent's conviction. . . .[and] held that, in light of what it characterized as insufficient congressional findings and legislative history, 'section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause.'" *Id.* at 552 (citing United States v. Lopez, 2 F.3d 1342, 1367-1368 (5th Cir. 1993)).

[11] Bill Burdett, *U.S. Supreme Court Review - At the Slaughterhouse Door: The Supreme Court's Narrow View of Federal Authority*, 79 MICH. B.J. 1220, 1220 (2000) (commenting that *Lopez* "dramatically altered the course of commerce clause jurisprudence"); Donald C. Massey, *Proposed On-Board Recorders for Motor Carriers: Fostering Safer Highways or Unfairly Tilting the Litigation Playing Field?*, 24 S. ILL. U. L.J. 453, 463 (2000) (noting that "[f]or

that part of the Gun Free School Zone Act ("GFSZA")[12] that had made it a federal offense to possess a gun within a school zone.[13]

For five years following *Lopez*, speculation abounded in academic journals[14] as to whether *Lopez* was an aberration[15] or, rather, reflected a shift from a laissez-faire Supreme Court to a more activist Court[16] in evaluating the constitutionality of statutes enacted under the Commerce Clause.[17] Specifically, activism by

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years, most observers believed that the Supreme Court would never strike down a law as exceeding Congress's power under the Commerce Clause: that power was thought to be plenary").

[12] 18 U.S.C. § 922(q)(2)(A) (1994), *amended by* 18 U.S.C. § 922(q)(1). The original version of the GFSZA made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."18 U.S.C. § 922(q)(2)(A) (1994).

[13] *See* 514 U.S. at 551 ("hold[ing] [that] the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several States'") (citing U.S. CONST., Art. I, § 8, cl. 3).

[14] *See* Anna Johnson Cramer, Note, *The Right Results for all the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 273 (2000) (stating that "*Lopez* surprised many scholars, prompting a rampage of commentary on the decision and the constitutionality of particular federal statutes"); Harsch, *supra* note 8, at 326 (noting that "much scholarly debate [was triggered] over whether *Lopez* would prove historically significant as a limitation on the commerce power") (footnote omitted).

[15] *See* Troy Robert Rackham, Note, *Enumerated Limits, Normative Principles, and Congressional Overstepping: Why the Civil Rights Provision of the Violence Against Women Act Is Unconstitutional*, 6 WM. & MARY J. WOMEN & L. 447, 464 (2000) (stating that "[the] *Lopez* [decision] was simply an aberrational response [by the Court] to the cavalier manner in which Congress passed the GFSZA").

[16] *See* Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201, 201 (2000) (commenting that "[t]he animating impulse of this 'contemporary activism is an interest in reviving the structural guarantees of dual sovereignty,' that is, in protecting the vitality of 'states as entities having residual sovereign rights'") (footnote omitted). Professor Shane further notes that "[d]elineating the respective spheres of national and state regulatory authority has been one of the Supreme Court's most enduring preoccupations." *Id.* at 203.

[17] *See* Alexander Dombrowsky, Comment, *Whether the Constitutionality of the Violence Against Women Act Will Further Federal Protection from Sexual Orientation Crimes*, 54 U.MIAMI L. REV. 587, 598 (2000) (stating that "[s]ome argue that *Lopez* will result in few changes, and . . . view the decision [as] an

the Court in evaluating statutes that attempted to regulate what seemingly are intrastate non-commercial or non-economic activities through the lens of federalism.[18] To others, the *Lopez* decision did not come as a surprise given the pro-federalism ideology the Court had had in recent years,[19] as it re-emphasized the Tenth Amendment as "a guardian of state sovereignty."[20]

The answer as to *Lopez's* significance finally came in May 2000 with the Supreme Court's decision in *United States v. Morrison*,[21] which held the civil rights provision of the Violence Against Women Act ("VAWA"),[22] to be unconstitutional. The civil rights provision, Section 13981,[23] created a private cause of action for

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incongruent anomaly. . . .[while] [o]thers believe the decision will spark a return to federalism"); Debbie Ellis, Case Note, *A Lopez Legacy?: The Federalism Debate Renewed, But Not Resolved*, 17 N. ILL. U. L. REV. 85, 121 (1996) (stating that "*Lopez* may . . . signal a major change in constitutional law"); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 68 (2000) (commenting that "*Lopez* . . . reveals a deep concern about issues of federalism, and especially about federal intrusion in areas traditionally controlled by the states"); Hatzimichalis, *supra* note 1, at 732 (stating that "[a]fter *Lopez*, the Court is, once again, taking the lead in judicially defining and preserving federalism as a task unto itself").

[18] *See* Ellis, *supra* note 17, at 102 (observing that "[t]he Court's conservative majority, long concerned about federalism issues, saw a perfect opportunity in *Lopez* to reign in Congress' power under the Commerce Clause").

[19] *See* Joan Biskupic, *Dispute May Test Power of Congress; Court to Review Law on Gender Violence*, WASH. POST, Sept. 29, 1999, at A3 (stating that "[i]n a series of recent rulings, the Supreme Court has curtailed congressional power in favor of the states").

[20] Hatzimichalis, *supra* note 1, at 722 (footnote omitted). "The Tenth Amendment . . . has been the linchpin of the Court's most recent stance toward a judicial doctrine of federalism and social regulation." *Id.* (footnote omitted). *See also* Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine: *Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283, 1283 (2000) (stating that the Supreme Court "has revived the Tenth Amendment as a limit on Congress's powers to regulate state governments").

[21] 120 S. Ct. 1740 (2000).

[22] Pub. L. No. 103-322, Title IV, § 40302, Sept. 13, 1994, 108 Stat. 1941.

[23] 42 U.S.C. § 13981 (1994) provides:

(a) Purpose.

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as

under section 8 of Article I of the Constitution, it is the purpose of this 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.

(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)).

(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) Definition.

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 least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means –

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, United States Code, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures.

(1) Limitation.

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a

victims of gender-motivated violence, thus permitting them to sue their attacker(s) in federal court.[24] Congress based its power to enact Section 13981 on the Commerce Clause,[25] using the same reasoning it had used in enacting the GFSZA.[26] Congress concluded that gender-based violence, like gun possession in school zones, substantially affected interstate commerce.[27] Despite Congress' well documented findings and reasoning, Section 13981 was criticized as being an unconstitutional exercise of Congress' commerce powers because it did not directly regulate an economic activity.[28]

> preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d).
> (2) No prior criminal action.
> Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c).
> (3) Concurrent jurisdiction.
> The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this subtitle.
> (4) Supplemental jurisdiction.
> Neither section 1367 of Title 28, United States Code, nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

Id. § 13981.

[24] *See* 42 U.S.C. § 13981(c) (1994).

[25] Congress also invoked Section 5 of the Fourteenth Amendment as its authority to enact the civil rights remedy. *See id.* § 13981(a).

[26] *See* Kurtz, *supra* note 3, at 1050 (stating that "Congress additionally relied on its power under Section 5 of the Fourteenth Amendment to enact the civil rights cause of action"). This Note is limited to discussing the civil rights provision as it relates to the Commerce Clause. *See infra* Part II.

[27] *See Morrison*, 120 S. Ct. at 1752; *see also infra* Section II.A (stating Congress' reasoning in how gender-motivated violence impacted interstate commerce).

[28] *See, e.g.*, Dombrowsky, *supra* note 17, at 588 (stating that "the VAWA has been met by severe constitutional criticism [with] . . . [o]pponents argu[ing] that Congress overstepped its Commerce Clause powers by enacting the VAWA").

The Supreme Court in *Morrison* invalidated the civil rights provision as exceeding Congress' ability to regulate under the Commerce Clause primarily on two grounds. First, the Court dismissed the plethora of congressional findings in Section 13981's legislative history that purported to link "the serious impact of gender-motivated violence on victims and their families"[29] to an affect on interstate commerce.[30] The Court rejected the findings because it determined that Congress relied on a "but-for"[31] method of reasoning, which it had already rejected in *Lopez* as being too attenuated.[32] Second, the Court invalidated Section 13981 out of a fear that upholding it would potentially leave no subject beyond Congress' power to regulate and would thus obliterate the boundaries of federalism.[33]

Although this Note contends that the *Morrison* Court was correct in invalidating the civil rights provision, the Court can be criticized for its manipulation of the traditional "rational basis" standard of review to achieve its desired outcome – that is, striking down Section 13981 without overruling any previously decided Commerce Clause cases.[34] The rational basis test had come to be the deferential test by which the constitutionality of legislation enacted under the Commerce Clause was evaluated.[35] Under that test, the Court would look to see whether Congress' determination that an activity impacted interstate commerce was rational and if

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[29] *Morrison*, 120 S. Ct. at 1752.

[30] *See id.* at 1752-53.

[31] *See id.* at 1751, 1753.

[32] *Id.* at 1752.

[33] *See id.* at 1752-53.

[34] This Note ultimately concludes that *Morrison* actually adopted a heightened standard of review for intrastate non-economic activities, thus replacing the rational basis standard.

[35] *See* Melissa Ann Jones, Note, *Legislating Gun Control in Light of* Printz v. United States, 32 U.C. DAVIS L. REV. 455, 462 (1999) (stating that "[t]he Supreme Court applies an extremely deferential rational basis test when reviewing congressional legislation enacted under the Commerce Clause") (footnotes omitted).

there was such a basis, whether the mechanism chosen by Congress to address this activity was appropriate.[36]

While the *Morrison* Court claimed to be adhering to precedent in conducting its evaluation, in reaching its conclusion, it actually created a new standard of review under the Commerce Clause. Furthermore, the Court did not articulate what considerations its evaluation actually encompassed, thus leaving lawmakers bewildered as to what is necessary in order for a statute regulating non-economic interstate activity to withstand a constitutional challenge. The Court's analysis seemingly differentiates between economic and non-economic activity and will not allow regulation of the latter even though there may be a rational basis to conclude that the activity substantially affects interstate commerce.[37] Although the Court specifically declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity"[38] to determine if the activity substantially affects interstate commerce, this Note argues that the Court effectively *did* adopt a per se rule, and that such a rule should not in fact be adopted.[39]

The new test that the *Morrison* Court used should be rejected for its application would preclude the regulation of intrastate non-economic activities that are claimed to substantially affect interstate commerce in the aggregate. The Court, however, can still delineate

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[36] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (stating that the test for appropriate use of the commerce power asks "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate").

[37] The import of *Lopez* and *Morrison* appears to be that the rational basis test will not be applied to non-economic activities. *See, e.g.*, Cramer, *supra* note 14, at 301 (stating that "*Lopez* created a distinction between economic and non-economic activity, limiting Congress to the former").

[38] *Morrison*, 120 S. Ct. at 1751.

[39] *See, e.g.*, Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 123 (2000) (noting that "[a]lthough [the *Morrison Court*] . . . declined to adopt a categorical rule against aggregating the effects of noneconomic activity, by interpreting prior case law as a limit on Congress's power to aggregate the effects of intrastate activity, *the Court effectively created the categorical rule it expressly disclaimed*") (emphasis added).

the limits of congressional regulatory authority without adopting a per se rule, thus leaving open the possibility to permit congressional regulation of such activity. In doing such, it is possible to reign in the most expansive post-New Deal precedent – as the *Lopez* and *Morrison* Courts were intent on doing – without resorting to a per se rule. However, the regulation of such would still have to pass scrutiny under the Court's independent evaluation.

In an attempt to reconcile the *Morrison* Court's ruling with Commerce Clause precedent, this Note articulates a standard of review to fill the void that was left ambiguous by *Morrison* with regard to congressional regulation of non-economic intrastate activity. While the heightened standard this Note proposes places greater restrictions on congressional authority than existed under the clear pre-*Lopez* Commerce Clause doctrine,[40] this standard would give Congress greater flexibility than a per se rule against regulation of intrastate non-economic activities, which is what the Court tacitly adopted in *Morrison*.[41] The necessity for instituting this heightened standard of review is the following: if the rational basis test was honestly employed (rather than discarded) by the *Morrison* Court, with proper judicial deference given to Section 13981's extensive legislative findings, it is easily conceivable that gender-motivated violence could have been found to substantially affect interstate commerce.[42] However, due to significant and

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[40] *See infra* Part IV (proposing a standard of review for intrastate non-economic activities).

[41] There would be greater congressional flexibility under this proposed standard because it would allow Congress to regulate intrastate non-economic activities so long as Congress satisfies the Court's independent evaluation of whether the activity substantially affects interstate commerce.

[42] *See, e.g.*, United States v. Morrison, 120 S. Ct. 1740, 1759-60 (2000) (Souter, J., dissenting). Justice Souter opined:

> The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. Any explicit findings that Congress chooses to make,

valid federalism concerns and the limits of Commerce Clause regulation, the Court should have taken the bold step and explicitly articulated a new test and defined what the limits to it are, rather than attempt to mutate the present standard of review without acknowledging its tact.[43]

Section I of this Note briefly describes the GFSZA, reviews the Supreme Court's analysis in *Lopez*, and recounts the uncertainty and quagmire that the federal courts and academics were in between *Lopez* and *Morrison*. Section II provides an overview of Section 13981, how the civil rights provision was supposedly enacted in such a way to insulate it from the same fate of the GFSZA and analyzes the Supreme Court's decision in *Morrison*. Section III presents three criticisms of the majority decision in

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> though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions . . . *can lead to only one conclusion.*

Id. (internal citations omitted) (emphasis added). Prof. Shane observes that:

> [t]he findings in VAWA's legislative history] standing alone would seem to sustain the VAWA readily under pre-*Lopez* doctrine. In enacting the VAWA, Congress rationally concluded that acts of gender-based violence, viewed cumulatively, place a substantial burden on interstate commerce and that the availability of a civil damages remedy would both reduce the resulting economic costs for the victims of violence and deter some degree of gender-based brutality.

Shane, *supra* note 16, at 216-17. *See also* Cramer, *supra* note 14, at 301 (stating "if the Court uses a rational basis test to review the statute, the heightened fact-finding performed by Congress will permit the Court to regard [Section 13981] as a constitutional exercise of Commerce Clause power") (footnote omitted).

[43] If the Supreme Court employed this proposed standard of review in *Morrison*, this Note contends that the Supreme Court could have reached the same ultimate conclusion to invalidate Section 13981, but would have done so without wreaking havoc on the standard of review. Under the Court's evaluation, it appears that if a non-economic (or non-commercial) intrastate activity is involved, the Court will not even reach the rationai basis test. The Court will simply invalidate the regulation if no jurisdictional hook is present. This is an unacceptable approach and if a case does come before the Court that regulates a non-economic intrastate activity but does not have any potential "causation problems" like Section 13981 or the GFSZA, then the Court's reasoning will be exposed.

Morrison. Finally, section IV will propose an alternative analytical framework that the Supreme Court could have adopted in deciding the constitutionality of the civil rights provision, and ultimately concludes that although the Court was correct in invalidating Section 13981, further clarification by the Court is needed as to the limits of congressional regulation under the Commerce Clause.

I. THE LEGACY OF *UNITED STATES V. LOPEZ*

Prior to *United States v. Morrison* there were varying conclusions as to the constitutionality of the civil rights provision.[44] These contradictory decisions were a result of the 1995 Supreme Court decision in *United States v. Lopez*, which clouded the waters of Commerce Clause jurisprudence.[45] According to some, and apparent from the various district court rulings, "*Lopez* [had] . . . left lower courts without guidance in their efforts to analyze cases based on the Commerce Clause."[46]

At issue in *Lopez* was a provision of the Gun Free School Zones Act of 1990 that made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[47] Congress reasoned that aggregating the intrastate possession of firearms in school zones across the nation substantially affected interstate commerce.[48] In its attempt to convince the Supreme

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[44] *See, e.g.*, Anisimov v. Lake, 982 F. Supp. 531, 535 (N.D. Ill. 1997) (stating that "[a] quick survey of the judicial and scholarly views on the significance of *Lopez* indicates that this Court is not alone in its uncertainty concerning how the Supreme Court will approach these issues when it considers future challenges to congressional authority under the Commerce Clause") (footnote omitted).

[45] *See* Christine M. Devey, Casenote, *Commerce Clause, Enforcement Clause, or Neither? The Constitutionality of the Violence Against Women Act in* Brzonkala v. Morrison, 34 U. RICH. L. REV. 567, 581 (2000) (stating that "[the civil rights provision] faced several challenges and '[a]lthough these courts relied on *Lopez*, they reached different results, demonstrating the difficulty of applying *Lopez*'") (footnote omitted).

[46] *Id.*

[47] 18 U.S.C. § 922(q)(2)(A) (1994), *amended by* 18 U.S.C. § 922(q)(1).

[48] The aggregation rationale is an outgrowth of the Supreme Court's decision

Court to uphold the GFSZA as a valid exercise of its power to regulate interstate commerce:

> [t]he Government argue[d] that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argue[d] that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being.[49]

Opponents of the GFSZA rejected this "cost of crime" and "national productivity" reasoning and argued that Congress exceeded its authority to legislate under the Commerce Clause in attempting to regulate an activity whose connection was tenuous at best to interstate commerce.[50]

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in *Wickard v. Filburn*, 317 U.S. 111, 133 (1942) (upholding the constitutionality of the Agricultural Adjustment Act of 1938 as applied to federal regulation of wheat). In *Wickard*, farmer Filburn grew wheat solely for home consumption and this wheat would have otherwise been satisfied by his purchases in the open market. The Court stated that, "even 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." *Id.* at 125. *See also* Charis Mincavage, *Title III of the Violence Against Women Act: Can It Survive a Commerce Clause Challenge in the Wake of* United States v. Lopez*?*, 102 DICK. L. REV. 441, 449-50 (1998) (stating that "[*Wickard*] provided Congress great breadth to regulate many activities which alone would not have a substantial effect on the economy but in the aggregate would have such an effect on interstate commerce").

[49] *United States v. Lopez*, 514 U.S. at 563 (citations omitted).

[50] *See id.* at 552; *see also* Johanna R. Shargel, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1878 (1997) (stating that "[a]ccording to critics of the VAWA Civil Rights Remedy, the

On April 26, 1995, the Supreme Court, in a five to four decision, struck down the GFSZA, holding that it exceeded Congress' ability to regulate activity under the Commerce Clause.[51] Chief Justice William Rehnquist, authoring the majority opinion, concluded that "[t]he Act neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession [of a firearm] be connected in any way to interstate commerce."[52]

In evaluating the constitutionality of the GFSZA, the *Lopez* Court reaffirmed that there are "three broad categories of activity that Congress may regulate under its commerce power."[53] Congress may "regulate the use of the channels of interstate commerce," the "instrumentalities of interstate commerce," and "activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[54] The *Lopez* Court concluded that for the GFSZA to be constitutional, "it must be under the third category as a regulation of an activity that substantially affects interstate commerce."[55] Under this category, Congress may regulate a class of purely intrastate activities, if this activity, in the aggregate, has a substantial affect on interstate commerce.[56]

After conducting its analysis under this category,[57] the *Lopez* Court rejected the government's reliance on the undocumented connection between the "cost of crime" on "national productivity," because, if accepted, this argument would permit Congress to

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Remedy is unconstitutional because it exceeds the well-defined scope of Section One [of the Constitution]").

[51] *See Lopez*, 514 U.S. at 551 (citing U.S. CONST., Art. I, § 8, cl. 3).

[52] *Id.*

[53] *Id.* at 558.

[54] *Id.* at 558-59 (citations omitted).

[55] *Id.* at 559.

[56] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (concluding that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce"). It remains to be seen whether it is dispositive that this activity is commercial or non-commercial in nature.

[57] *Lopez*, 514 U.S. at 551.

"regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."[58]

A. *Uncertainty as to Lopez's Significance*

The *Lopez* Court's holding reverberated throughout Commerce Clause jurisprudence because it was the first decision by the Supreme Court in nearly sixty years to declare a statute passed by Congress under the Commerce Clause to be unconstitutional.[59] *Lopez's* impact on Commerce Clause jurisprudence was debated immediately.[60] In addition to the overriding question of whether federalism concerns would undermine further attempts to regulate traditional areas of local concern, there were three additional areas of uncertainty. First, to some, *Lopez* served as a reminder to Congress that there were in fact limits to what it could regulate under the Commerce Clause, while others considered *Lopez* to be a mere aberration in sixty-plus years of non-interference with Congress in regards to Commerce Clause regulation.[61] Second,

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[58] *Id.* at 564 (citation omitted).

[59] *See, e.g.*, William Funk, *The* Lopez *Report*, 23-SUM ADMIN. & REG. L. NEWS 1, 1 (Summer 1998). Professor Funk opined:

> [T]he Supreme Court surprised much of the legal world . . . [because] [f]or nearly sixty years the Court had rejected claim-after-claim that a statute violated the Commerce Clause, and observers had generally come to believe that . . . while there might be a theoretical limit on Congress's power, there was no practical limit. *Lopez* proved that *Id.* observation false.

[60] *See* Terry v. Reno, 101 F.3d 1412, 1415 (D.C.Cir. 1996) (stating that "[*Lopez's*] impact on the limits of the commerce power [was] a hotly debated issue"); Devey, *supra* note 45, at 573 (observing that "[s]cholars have disagreed as to the impact *Lopez* will have on Commerce Clause precedent") (footnote omitted).

[61] *See* Antony Barone Kolenc, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 867, 876 (1998) (noting that "[f]or many, [*Lopez*] was confirmation that federalism was not dead and that Congress' powers under the Commerce Clause were not plenary"); *see also* Hatzimichalis, *supra* note 1, at 773 (stating that "[t]he Court has been at the vanguard of a movement to enforce a vision of federalism in consonance with the Framers' writings, the

there was uncertainty as to whether the outcome in *Lopez* would have differed if there had in fact been congressional findings present in the GFSZA's legislative history supporting the connection between gun possession in school zones to a negative impact upon interstate commerce.[62] Many courts and commentators claimed that *Lopez* would probably have been decided differently if Congress had accumulated legislative findings establishing that the aggregate affect of gun possession in school zones could substantially affect interstate commerce.[63]

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text, structure, original understanding, and history of the Constitution").

[62] The *Lopez* Court stated that to conclude that the GFSZA addressed a problem that substantially affected interstate commerce would require the Court to "pile inference upon inference" in a manner that would essentially make Congress' power to regulate local non-economic activity under the guise of the Commerce Clause limitless. 514 U.S. at 567. The Court stated that if the government's argument was accepted, "it is difficult to perceive any limitation on federal power . . . even in areas . . . where States historically have been sovereign. 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.* at 564. *See* Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?* 85 K.Y. L.J. 767, 780 (1997) (stating that the *Lopez* Court rejected the government's reasoning because acceptance of it would "permit Congress to regulate virtually all activities that lead to violence crimes, regardless of their effects on interstate commerce").

[63] *See, e.g.*, United States v. Wilson, 73 F.3d 675, 684 (7th Cir. 1995) (stating that "[i]t is easy enough to imagine congressional findings that, if found rational, could have made *Lopez* a very different case"); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998). The Iowa district court observed:

> [T]his court reads *Lopez* to have invalidated the [GFSZA], not because it regulated non-commercial or non-economic activity, but because the Court could not find that the non-commercial, non-economic activity regulated had the requisite substantial effect upon interstate commerce, since the regulation lacked either jurisdictional elements or supporting legislative findings demonstrating that the activity had the necessary substantial effect.

Id. at 1418 (citation omitted). *See* Judi L. Lemos, Comment, *The Violence Against Women Act of 1994: Connecting Gender-Motivated Violence to Interstate Commerce*, 21 SEATTLE U. L. REV. 1251, 1261 (1998) (concluding that *Lopez* required congressional findings to establish a rational basis and hence the VAWA would be found constitutional by the Supreme Court). *Cf.* Santiago v. Alonso,

This debate over the significance of congressional findings to support federal regulation of non-economic activity was spurred on by comments the Court made in the closing paragraph of *Lopez*. The Court stated that "[t]o uphold the Government's contentions here, we 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."[64] Some commentators argued that these comments regarding the absence of legislative findings by the majority were "dicta" and that the outcome in *Lopez* would not have differed even if such legislative findings were present.[65]

Third, and perhaps most importantly, it remained uncertain as to whether the standard of review remained the rational basis standard as articulated in *Hodel v. Virginia Surface Mining*.[66]

61, 67 (D. P.R. 2000) (rejecting interpretations of *Lopez* that concluded that the decision hinged on the absence of congressional findings).

[64] *Lopez*, 514 U.S. at 567.

[65] *See, e.g.*, Christine Conover, *The Violence Against Women Act: Stabilizing Commerce Through a Civil Rights Remedy*, 1 J. GENDER RACE & JUST. 269, 275 (1997) (noting that "the [*Lopez*] Court's dicta indicates that [it] may require the government, or whoever supports the legislation at issue, to present legislative findings in litigation"); Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1910 (1996) (stating that the District Court of Virginia, in ruling on *Brzonkala*, noted that "the lack of findings in *Lopez* did not mandate the unconstitutionality of the Gun-Free School Zones Act").

[66] 452 U.S. 264, 276 (1981) (explaining that under the rational basis test "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding" and once this established, "the only remaining question for judicial inquiry is whether 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution'") (citations omitted); *see* Lori L. Shick, Comment, *Breaking the "Rule of Thumb" and Opening the Curtains – Can the Violence Against Women Act Survive Constitutional Scrutiny?*, 28 U. TOL. L. REV. 887, 909-10 (1997) (discussing how *Lopez* left much uncertainty in the appropriate standard of review to be employed). "*Lopez* shed[] no light on whether the role of reviewing courts of congressional regulation remains as it was articulated in *Hodel*, a rational basis review." *Id.*

Commentators[67] and courts[68] noted that the *Lopez* Court appeared to apply a stricter test than the *Hodel* rational basis test, which had previously been espoused as the appropriate level of scrutiny for legislation enacted under the Commerce Clause. Justice Souter in dissent also noted that the majority seemingly employed a stricter degree of scrutiny by its distinguishing between commercial and non-commercial activities.[69] The majority did not indicate, however, that it was overruling or modifying the rational basis test, thus suggesting that it was affirming it.[70]

Despite varying district court interpretations of *Lopez* and the countless articles speculating over *Lopez's* significance, clarification from the Supreme Court was not immediately forthcoming. Although it was not known at the time, the Court's first opportunity to clarify its holding in *Lopez* began to take form even before the *Lopez* ruling was pronounced in 1995 with Congress' passage of the Violence Against Women Act in 1994.[71]

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[67] *See, e.g.*, Chris A. Rauschl, Brzonkala v. Virginia Polytechnic and State University: *Violence Against Women, Commerce, and the Fourteenth Amendment - Defining Constitutional Limits*, 81 MINN. L. REV. 1601, 1611 (1997) (stating that "[t]he Court in *Lopez* . . . applied a heightened version of the rational basis review").

[68] According to the Sixth Circuit in *United States v. Wall*, 92 F.3d 1444, 1459 (6th Cir. 1995), the *Lopez* Court appeared to apply a heightened standard of review for "non-economic activity," rather than the rational basis test that had previously been espoused by the *Hodel* Court for evaluating Commerce Clause legislation. The *Wall* Court added that "[t]hough there is obviously nothing in *Lopez* to indicate that the Court was applying strict scrutiny, the Court was definitely not applying minimal, rational basis scrutiny to the GFSZA." *Id.* For a discussion of secondary sources discussing whether *Lopez* espoused a higher level of scrutiny for legislation enacted under the Commerce Clause, see id. at 1459.

[69] *See Lopez* 514 U.S. at 608 (Souter, J., dissenting) (stating that "the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation").

[70] *See* Tichenor, *supra* note 6 at 331 (stating that "the Supreme Court [in *Lopez*] did not overrule the rational basis test to determine whether a federal statute is within the Commerce Clause, but in fact reaffirmed the test").

[71] *See supra* note 22.

II. THE VIOLENCE AGAINST WOMEN ACT

The Violence Against Women Act was proposed in 1990[72] and was passed in September 1994.[73] The impetus to enact the civil rights provision was the recognition of widespread violence against women[74] and because women were facing a pervasive inability to obtain recourse in state courts for such acts.[75] As such, Congress decided that federal action was appropriate and would not violate principles of federalism since the states had not taken sincere action in this area.[76] "Congress was concerned that gender-based acts of violence were sufficiently widespread and unchecked as to significantly and negatively affect commerce among the states."[77] The subsequent enactment of the VAWA and

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[72] *See* S. REP. 101-545 (1990). Senator Joseph Biden, from the Senate Committee on the Judiciary, first proposed the Violence Against Women Act in a 1990. *Id.* Senator Biden stated that "[i]t is time to take on this national outrage, and it is time to deal with it and make people aware of it." *Id.*

[73] *See* S. REP. No. 104-343 (1996). The Violence Against Women Act was passed as part of the Violent Crime Control and Law Enforcement Act of 1994 and President Clinton signed the bill into law on September 14, 1994. *Id.*

[74] *See* Lisa M. Fitzgerald, *The Violence Against Women Act: Is it an Effective Solution?*, 1 HOW. SCROLL 46, 50 (1993) (commenting that "[t]he problem of violence against women is a national crisis which has not been successfully remedied by the state legal system").

[75] *See* Maloney, *supra* note 65, at 1885 (stating that "Congress recognized both the scope of the problem of gender-motivated violence and that existing [state] law did not provide an adequate solution"); Melanie L. Winskie, Note, *Can Federalism Save the Violence Against Women Act?*, 31 GA. L. REV. 985, 985-86 (1997). "In states across the country, victims of gender-based violence are systematically mistreated by both the courts and the police: judges and law enforcement officers mock domestic abuse and rape victims by belittling their testimony, and police and prosecutors frequently refuse to enforce the law on their behalf." *Id. See also* Kurtz, *supra* note 3, at 1100 (commenting that "[v]iolence against women is a despicable [and] disheartening, and . . . [i]t is only natural for legislators to want to do something to prevent its occurrence").

[76] *See* S. REP. No. 102-197, at 43 (1991).

[77] Ericson v. Syracuse University, 45 F. Supp. 2d 344, 345 (S.D.N.Y. 1999) (holding the civil rights provision constitutional under the Commerce Clause); *see* S. REP. NO. 102-197, at 36 (1991) (discussing the distressing prevalence of rape and abuse of women in the United States).

Section 13981 was viewed as giving "victims of workplace violence and sexual harassment a powerful legal sword" and "tell[s] victims that the nation takes their plight seriously."[78] Although the VAWA has numerous provisions,[79] it was Section 13981 that was repeatedly challenged from its enactment as exceeding Congress' power to enact legislation under the Commerce Clause.[80]

A. The Civil Rights Provision - Section 13981

The civil rights provision was a novel approach to address gender-motivated violence in the United States.[81] It provided victims of gender-motivated violence[82] with a private cause of action to sue their assailant(s) in federal court to recover "compen-

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[78] David M. Fine, Note, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252, 302 (1998).

[79] For a discussion of the various provisions of the VAWA, see Leonard Karp & Laura C. Belleau, *Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act*, 16 J. AM. ACAD. MATRIM. LAW 173, 178-81 (1999).

[80] *See* Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1099 (1998) (noting that "[the] VAWA . . . has been plagued by objections based on federalism").

[81] *See* S. Rep. No. 102-197, at 42 (1991) (noting that "Title III of the Violence Against Women Act provides the first civil rights remedy for serious 'gender-based' violence, allowing any victim of such a crime to bring a Federal action against their attacker for damages and other relief"); Celia Guzaldo Gamrath, *Enforcing Orders of Protection Across State Lines*, 88 ILL. B.J. 452 (2000) (stating that "the civil rights remedy, was a historic, ground-breaking civil rights provision"); Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 128 (1999) (stating that the "VAWA contains an historic civil rights provision").

[82] The act of violence must have been specifically motivated by a gender animus and not simply a random act. *See* 42 U.S.C. § 13981(d)(1) (1994); *see also* Jennifer Gaffney, Note, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J.L. & POL'Y 247 (1997) (arguing that Congress should amend VAWA such that a rebuttable presumption of gender animus exists in all rape cases).

satory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."[83] Prior to enacting the VAWA, congressional committees heard a plethora of testimony on the affects violence on women has on the national economy and interstate commerce.[84] Since Congress has no

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[83] 42 U.S.C. § 13981(c).

[84] Congress heard testimony from "law enforcement officials, anti-domestic violence organizations, rape crisis centers, psychiatrists, other mental health experts, physicians, law professors, staff attorneys from legal advocacy groups, state Attorneys General, and victims of domestic violence." Doe v. Doe, 929 F. Supp. 608, 611 (D. Conn. 1996) (commenting on the extent of congressional findings claiming that gender-motivated violence affects interstate commerce); *see also* S. REP. NO. 103-138, at 154-155 (1993).

> THE AUTHORITY: CONGRESS HAS THE CONSTITUTIONAL POWER TO ENACT TITLE III
>
> Congress's power to enact title III is firmly based on the Commerce Clause and on section 5 of the 14th Amendment. Scholars have testified that the constitutional basis for this remedy is sound. A Prof. Cass Sunstein concluded, "the constitutional objections to the bill are quite weak. * * * we are talking here about something that is in the core of the Equal Protection Clause as it was originally understood * * *."
>
> 1. The Commerce Clause
>
> There is no doubt that the Congress has the power to create the title III remedy under the Constitution's Commerce Clause. The Commerce Clause is a broad grant of power allowing Congress to reach conduct that has even the slightest effect on interstate commerce; Congress need only have a "rational basis" for creating such a law.
>
> The Commerce Clause gives Congress the authority to act even if the proposed law, on its face, does not directly effect "commerce." Civil rights laws and Federal criminal laws have both been created based on Congress's power under the Commerce Clause. Congress's power under the Commerce Clause also reaches conduct that may seem purely local in nature. For example, street corner sales of home-manufactured drugs can be made illegal by Congress because of the Commerce Clause power.
>
> Gender-based violent crimes meet the modest threshold required by the Commerce Clause. *Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces*

general police power to utilize,[85] Congress purported to enact Section 13981 under its power to regulate interstate commerce, reasoning that individual acts of gender-motivated violence in the aggregate substantially affected interstate commerce.[86] In enacting the civil rights provision under the guise of the Commerce Clause, Congress stated that:

> [c]rimes of violence motivated by gender has a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.[87]

After numerous district courts predominantly upheld Section 13981[88] and one circuit court invalidated it,[89] the Supreme Court

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> *consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets - women - from full participation in the national economy.* For example, studies report that almost 50 percent 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. (footnotes omitted) (emphasis added).

[85] Fine, *supra* note 78, at 262 (stating that "[b]ecause there is no general federal police power, Congress had to rely extensively on the Commerce Clause for the authority to enact VAWA") (footnotes omitted).

[86] 42 U.S.C. § 13981(a).

[87] H.R. CONF. REP. No. 103-711, at 385 (1994).

[88] *See, e.g.*, Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass. 1999); Liu v. Striuli, 36 F. Supp. 2d 452, 477 (D.R.I. 1999); Doe v. Hartz, 970 F. Supp. 1375, 1422 (N.D. Iowa 1997); Doe v. Doe, 929 F. Supp. 608, 610 (D. Conn. 1996).

[89] Brzonkala v. Virginia, 169 F.3d 820 (4th Cir. 1999) (en banc), *aff'd sub nom* United States v. Morrison, 120 S. Ct. 1740 (2000); *see* Linda Greenhouse, *Supreme Court to Rule on Law that Allows Rape Victims to Sue Attackers*, N.Y. TIMES, Sept. 29, 1999, at A20 (stating that "[t]he Fourth Circuit was the first

was poised to answer the question as to whether *Lopez's* invalidation of the GFSZA would lead to a similar result for Section 13981 of the VAWA.

B. *United States v. Morrison*

1. *Background and Speculation*

United States v. Morrison initially began with the caption of *Brzonkala v. Virginia Polytechnic and State University*[90] in 1995, when Christy Brzonkala, who had been a freshman at Virginia Polytechnic and State University ("VPSU"), filed a complaint against two VPSU football players,[91] in the District Court for the Western District of Virginia for an alleged rape committed against her in September 1994 in a dormitory room at VPSU.[92] The suit by Brzonkala was the first action to be brought under the civil rights provision.[93] The District Court in *Brzonkala* held the civil rights provision unconstitutional under the Commerce Clause.[94] After an appeal, the Fourth Circuit, in a divided opinion, reversed

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appeals court to decide the constitutionality of the [VAWA]").

[90] 935 F. Supp. 779 (W.D. Va. 1996) [hereinafter "*Brzonkala I*"].

[91] *See* 169 F.3d at 827. Brzonkala also sued the university for violating Title IX for its "fail[ure] to take prompt remedial action in response to the sexually hostile environment cause by the gang rape, in flagrant violation of established sexual harassment law . . . [and for] discriminat[ing] against her on the basis of sex in conducting its disciplinary proceedings." Brief of Appellant at 7-8, Brzonkala v. Virginia, 132 F.3d 949 (4th Cir. 1997).

[92] Appellant's Brief at 2, 132 F.3d 949 (4th Cir. 1997).

[93] *Court to Rule on Authority of Congress*, S.F. CHRON., Sept. 29, 1999, at A7.

[94] *See* Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 779, 801 (W.D. Va. 1996) (holding that "[the] VAWA is an unconstitutional exercise of Congress's power, unjustified under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment").

the district court's decision.[95] This decision was soon vacated[96] and the Fourth Circuit reheard the case *en banc* in March 1999.[97]

Relying on *Lopez*,[98] the full panel of the Fourth Circuit invalidated Section 13981 as being an unconstitutional exercise of congressional power under the Commerce Clause.[99] The panel held that the civil rights provision "neither regulates an economic activity nor contains a jurisdictional element" to ensure that each specific application of the regulation involves an activity that in fact substantially affects interstate commerce.[100] The Supreme Court granted *certiorari* thereafter in September 1999.[101]

With five years of speculation over whether *Lopez* was simply an aberration in the Supreme Court's sixty year history of non-interference with congressional regulation under the Commerce Clause, and with varying conclusions as to the constitutionality of the civil rights provision reaching a crescendo in the lower courts,[102] *Morrison* provided the Supreme Court the opportunity to resolve the question over *Lopez's* significance.

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[95] *See* Brzonkala v. Va. Polytechnic & State Univ., 132 F.3d 949, 973 (4th Cir. 1997) [hereinafter "*Brzonkala II*"]. The court stated that "it is apparent that Congress took great care to detail its findings and support its conclusion that VAWA was within its commerce authority." *Id.*

[96] Brzonkala v. Va. Polytechnic & State Univ., 132 F.3d 949 [hereinafter "*Brzonkala II*"].

[97] Brzonkala v. Va. Polytechnic Univ., 169 F.3d 820 (4th Cir. 1999) (en banc) [hereinafter "*Brzonkala III*"].

[98] *See id.* at 851 (stating that the impact on interstate commerce is not direct, "it is almost precisely analogous to the attenuated, though undoubtedly real, relationship asserted to exist between guns in school zones and interstate commerce").

[99] 169 F.3d at 826 (holding that "section 13981 exceeds Congress' power under both the Commerce Clause of Article I, Section 8, and the Enforcement Clause of Section 5 of the Fourteenth Amendment").

[100] *Brzonkala III*, 169 F.3d at 833. Further, the Court stated that "[the civil rights provision] cannot be sustained on the authority of *Lopez* nor any of the Court's previous Commerce Clause holdings, as a constitutional exercise of Congress' power to regulate interstate commerce." *Id.*

[101] United States. v. Morrison, 527 U.S. 1068 (1999).

[102] *See, e.g., supra* notes 88-89.

2. *Supreme Court Analysis*

One commentator stated that "[p]rior to the Supreme Court's decision in *Lopez*, there would have been no question of [the civil rights provision's] constitutionality."[103] However, on May 15, 2000, the Supreme Court answered the question of *Lopez's* significance in Commerce Clause jurisprudence.[104] In a methodical 5-4 opinion, again authored by Chief Justice Rehnquist,[105] the Court invalidated the civil rights provision as exceeding Congress' power to regulate activity under the Commerce Clause.[106]

The *Morrison* Court stated that it is fundamental that there are limits to congressional action under the Constitution.[107] More importantly, the Court stated that its analysis of whether an activity has a substantial relation to interstate commerce was controlled by the *Lopez* framework.[108] Perhaps foreshadowing the fate of

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[103] Renshaw, *supra* note 3, at 841.

[104] *See* United States v. Kee, 2000 WL 863117, at * 2 (S.D.N.Y. June 27, 2000) (stating "[*Morrison*] reaffirms the standard set in *Lopez*"); *see also* William L. Church, *The Eastern Enterprises Case: New Vigor for Judicial Review?*, 2000 WIS. L. REV. 547, 571 n.84 (2000) (stating that "[w]e recently learned how important *Lopez* was").

[105] *Lopez* also was decided 5-4, with the same judges being in the majority and minority in both cases. *See* David G. Savage, *High Court to Rule on Rights of Grandparents*, L.A. TIMES, Sept. 29, 1999, at A1 (stating "the court's five conservatives . . . have voted as a bloc in recent years to strengthen states' rights and to limit the power of Congress").

[106] In *Morrison*, the Supreme Court also declared the civil rights provision an unconstitutional exercise of Congress' power to enforce the Equal Protection Clause of the Fourteenth Amendment. 120 S. Ct. at 1759 (holding that "Congress' power under § 5 does not extend to the enactment of § 13981"). As previously stated, this portion of the opinion is beyond the scope of this paper and will not be discussed.

[107] *See Morrison*, 120 S. Ct. at 1748 (stating that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution").

[108] *See id.* at 1745. Before beginning its analysis of Section 13981 under the *Lopez* analysis, the majority stated that "[s]ince *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981." *Id.* at 1749. *See also* Gamrath, *supra* note 81 at 453 (noting that

Section 13981, the Court began its analysis by explicitly stating that "[t]he powers of the legislature are defined and limited . . . [and that] those limits may not be mistaken or forgotten."[109] Although the Court proclaimed that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a *plain* showing that Congress has exceeded its congressional bounds,"[110] the Court's analysis revealed that it had a very expansive definition of the word "plain," as Section 13981 was invalidated despite specific congressional findings that gender-based violence negatively impacted interstate commerce.[111]

The *Morrison* Court acknowledged *Lopez's* recognition that Commerce Clause jurisprudence has evolved over time[112] and that "in the years since *NLRB v. Jones & Laughlin Steel Corp.*,[113] Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted."[114] However, the *Morrison* majority, continuing where *Lopez* left off, reiterated *Lopez's* admonition that "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."[115] Moreover, citing *Lopez*, the *Morrison* Court stated that:

"[t]he Court in *Morrison* relied heavily on *Lopez*").

[109] *Morrison*, 120 S. Ct. at 1748 (citing Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 176 (1803)).

[110] *Id.* (emphasis added) (citations omitted). The *Morrison* Court further stated that there was a "presumption of constitutionality" present. *Id.*

[111] *See id.* at 1752 (stating that "§ 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families") (citations omitted).

[112] *Id.* at 1748 (stating that "interpretation of the Commerce Clause has changed as our Nation has developed").

[113] 301 U.S. 1 (1937).

[114] *Morrison*, 120 S. Ct. at 1748 (citation omitted).

[115] *Id.* (citation omitted); *see also* Santiago v. Alonso, 96 F. Supp. 2d 58, 62 (D. P.R. 2000) (stating "even those cases which greatly expanded Congress' power under the Commerce Clause had recognized that congressional power was subject to outer limits"); Kolenc, *supra* note 61 at 873 (stating that the "expansion of the commerce power reached its apogee with the Court's support of Title II of the Civil Rights Act of 1964").

> [E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.[116]

The *Morrison* Court recognized that several factors controlled its decision in *Lopez*[117] and reaffirmed the *Lopez* demarcation of three broad categories of activity that Congress may regulate under the Commerce Clause.[118] The Court stated that Section 13981 should be analyzed under the third category of activities – the substantially affects commerce test – given the statute's "focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce)."[119] Following the framework of the *Lopez* analysis, the *Morrison* Court first concluded that the civil rights provision did not regulate economic activity and that there was no precedent for upholding the regulation of non-economic activity. Specifically, the Court stated that:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.[120]

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[116] *Morrison*, 120 S. Ct. at 1748-49 (internal quotation marks and citations omitted).

[117] *See id.* at 1749.

[118] *See id*; *see also, supra* Part I (describing these three categories).

[119] *Morrison*, 120 S. Ct. at 1749.

[120] *Id.* at 1751 (citation omitted). *Cf.* United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998) (stating that "Congress may regulate to prevent the inhibition

Second, "[l]ike the Gun-Free School Zones Act at issue in *Lopez*, section 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."[121] Third, the *Morrison* Court stated that "[i]n contrast with the lack of congressional findings that we faced in *Lopez*, section 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."[122] Responding to these findings, however, the Court added that:

> the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' Rather, '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'[123]

For five years, proponents of the civil rights provision's constitutionality had distinguished *Lopez* and staked their claim as to the civil rights provision's constitutionality based on the presence of the

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or diminution of interstate commerce . . . even when the activity controlled is not itself commercial") (citation omitted). The majority in *Morrison* criticized Justice Souter's "downplay[ing] [of] the role that the economic nature of the regulated activity plays in [its] Commerce Clause analysis" and for his lack of recognition that *Wickard* dealt with a commercial activity. *Morrison*, 120 S. Ct. at 1750.

[121] *Morrison*, 120 S. Ct. at 1751.

[122] *Id.* at 1752 (citations to congressional record omitted).

[123] *Id.* (citation omitted).

findings in its legislative history.[124] In one breath the Court vanquished this contention.

Finally, the *Morrison* Court concluded that accepting the presence of congressional findings to be dispositive as to the constitutionality of a statute had the potential to allow Congress to regulate anything it wished without regard to the limitations of congressional power found in the Constitution.[125] Specifically, the *Morrison* Court stated that "Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers."[126]

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[124] Congress found that gender-motivated violence affects interstate commerce:

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Id. (citations omitted).

[125] The *Morrison* Court concluded under the third category of *Lopez* that:

> Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is part.

Id. at 1752-53.

[126] *Id.* at 1752. Although the GFSZA did not have accompanying legislative findings, the *Lopez* Court rested its decision "in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated." *Id.* at 1751. It was under this prong of its analysis where the Government had posited its so-called "cost of crime" and "national productivity"

The Court specifically pointed to the Congress' attempt to connect gender-motivated violence to interstate commerce as being analogous to the method of reasoning already rejected in *Lopez*.[127] The Court was deeply concerned, yet again, as to the limitless areas that could potentially be regulated by Congress if Section 13981 was upheld.[128] The Court ultimately concluded that it:

> accordingly reject[s] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.[129]

Ironically, the presence of the extensive congressional findings – the element that commentators believed would ultimately distinguish Section 13981 from Section 922(q) of the GFSZA – proved to undermine the VAWA's constitutionality as well. The Court believed that accepting these findings would "completely obliterate the Constitution's distinction between national and local authority"[130] and "would allow Congress to regulate any crime so

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arguments. *Id.*

[127] *Id.* at 1752.

[128] The Court stated that:

> Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. . . . Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.

Id. at 1753.

[129] *Id.* at 1754 (citations omitted).

[130] *Id.* at 1752.

long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[131]

The Court noted that if the petitioners' "but-for"[132] reasoning were accepted, then Congress would not be limited to regulating gender-motivated violence, but also other forms of violence and other areas traditionally viewed as being within the State's concern such as family law[133] "and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and child-rearing on the national economy is undoubtedly significant."[134] Most poignantly, the Court stated that "[u]nder our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace."[135]

Despite the commendable motivation to enact the civil rights provision of the VAWA, the *Morrison* Court made the judicially correct decision by invalidating it.[136] However, the *Morrison* Court can be criticized not for the ends it reached, but rather, for the analytical means which it employed to get there.

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[131] *Id.* at 1752-53.

[132] *Id.* at 1752.

[133] *See* Laura W. Morgan, *The Federalization of Child Support a Shift in the Ruling Paradigm: Child Support as Outside the Contours of "Family Law"*, 16 J. AM. ACAD. MATRIM. LAW 195 (1999) (stating that "'[f]amily law' has long been singled out by the United States Supreme Court as the one area, more than any other, into which the federal government may not intrude, either by legislation, regulation, or assertion of federal jurisdiction").

[134] *Morrison*, 120 S. Ct. at 1753 (footnote and citations omitted).

[135] *Id.*

[136] Chief Justice Rehnquist noted as much when in the final paragraph of the Court's opinion where he stated that "Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. . . . If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison." *Morrison*, 120 S. Ct. at 1759.

III. CRITICISM OF MORRISON

A. *The Morrison Majority Manipulated the Traditional Standard of Review in Its Analysis of Section 13981's Constitutionality*

The *Morrison* Court can be criticized for its manipulation of the standard of review under the "substantially affects test" in reaching its ultimate conclusion.[137] The Court refused to articulate a new standard of review, although it effectively created one. It seems evident that the *Morrison* Court desired to invalidate the civil rights provision[138] while attempting to maintain *stability* in what, prior to *Lopez*, had evolved to be a fairly cogent doctrine in Commerce

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[137] One commentator made this critique of the *Lopez* Court as well stating that "[t]he *Lopez* Court . . . mischaracteriz[ed] precedent." Peter J. Liuzzo, Comment, Brzonkala v. Virginia Polytechnic and State University: *The Constitutionality of the Violence Against Women Act -- Recognizing that Violence Targeted at Women Affects Interstate Commerce*, 63 BROOK. L. REV. 367, 387 (1997).

[138] Justice Souter criticized the Court for distinguishing between commercial and non-commercial activities under the substantially affects test and for its manipulation of the standard of review, all in the name of the Court implementing its federalism ideology. Justice Souter stated that:

> [I]n the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power.

Morrison, 120 S. Ct. at 1768 (Souter, J., dissenting).

Clause jurisprudence.[139] The impetus behind the majority's approach was its desire to reinforce its federalism views,[140] which have been a hallmark of the Rehnquist Court over the past decade.[141]

Although *Morrison*, like *Lopez*, claimed not to have overruled any cases and simply clarified Commerce Clause jurisprudence, the *Morrison* decision cannot be reconciled with established precedent.[142] Because both *Lopez* and *Morrison* claimed not to be overruling prior Commerce Clause cases – which held that congressional regulation under the Commerce Clause would be valid if there were a rational basis to find the regulated activity had a substantial effect on interstate commerce – these two decisions

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[139] *See id.* at 1773 (Souter, J., dissenting) (stating that by the majority's opinion,"[c]ases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived").

[140] Lustig, *supra* note 7, at A4 (explaining that the reason "[w]hy the Court in *Lopez* and *Morrison* chose to repudiate precedent and not defer to the expressed judgment of Congress . . . can only be explained as the handiwork of a Court willing to reshape constitutional law to advance its conservative political agenda").

[141] *See* Linda Greenhouse, *States Rights Adherents on Top Court Appear to Be Given Pause*, N.Y. TIMES, Nov. 11, 1999, at A20 (stating "the Court's federalism divide has developed over the last several years"); Michael W. McConnell, *Let the States Do It, Not Washington*, WALL ST. J., March 29, 1999 at 17 (noting that "[f]or the past decade the Supreme Court has been reviewing an old but important idea that the powers vested in the federal government are not limited."). In recent years the Supreme Court has decided several cases that have returned power to the States. *See, e.g.*, New York v. United States, 505 U.S. 144, 149 (1992) (holding sections of the Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional); Printz v. United States, 521 U.S. 898 (1997) (holding sections of the Brady Hand Gun Violence Prevention Act unconstitutional); *see also* Hatzimichalis, *supra* note 1, at 726 (stating that "[t]he Court, in its decisions in *Ashcroft*, *Printz*, *New York*, and *[Reno v.] Condon*[,] made one thing patently clear: that it—and no other coordinate branch of government—will be the final arbiter of federalism and that the Court will take an active role in preserving our system of dual sovereignty") (footnotes omitted).

[142] *See, e.g.*, *Morrison*, 120 S. Ct. at 1765 (Souter, J., dissenting) (stating "[the majority's] characterization of [the] substantial effects [test] has no support in our cases"); Ellis, *supra* note 17, at 102 (commenting that "[t]he [*Lopez*] majority's decision is inconsistent with precedent").

have created and will further create chaos in Commerce Clause jurisprudence, both in Congress and in the courts because it is unclear whether a new doctrine has emerged, and if so, *what* this doctrine is.

Historically the Supreme Court and lower federal courts gave great deference to Congress in regulating activities under the Commerce Clause.[143] Courts would merely look to see whether Congress' determination that the activity being regulated substantially affected interstate commerce was rational,[144] although determining the statute's constitutionality was stated to ultimately be a judicial rather than a legislative function.[145] A reviewing court would "'invalidate legislation enacted under the Commerce Clause only if it [was] clear that there [was] no rational basis for a congressional finding that the regulated activity affects interstate

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[143] Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (stating that "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."); Rebecca E. Hatch, Note, *The Violence Against Women Act: Surviving the Substantial Effects of United States v. Lopez*, 31 SUFFOLK U. L. REV. 423, 423 (1997) (noting that "[h]istorically, the Supreme Court . . . has given substantial deference to Congress in the enactment of legislation based on the Commerce Clause"); *see* Chris A. Rauschl, Comment, Brzonkala v. Virginia Polytechnic and State Univ.: *Violence Against Women, Commerce, and the Fourteenth Amendment - Defining Constitutional Limits*, 81 MINN. L. REV. 1601, 1611 (1997) (observing that "[t]raditionally, the Court evaluated Congress's conclusions regarding a regulated activity's nexus to interstate commerce with a deferential rational basis standard of review").

[144] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981) (stating that "[when] Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational"); Hatch, *supra* note 143 at 423 n.1 (providing examples of legislation found constitutional under the Commerce Clause).

[145] *See* 120 S. Ct. at 1752 (stating that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so") (citations omitted). Justice Souter, dissenting from the majority in *Morrison* stated that "[t]he business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact." *Morrison*, 120 S. Ct. at 1760 (Souter, J., dissenting).

commerce, or that there [was] no reasonable connection between the regulatory means selected and the asserted ends.'"[146]

Under the rational basis test, "the Court typically defers to the wisdom of the legislature if a rational basis for the statute could exist."[147] The court in *Ericson v. Syracuse University*,[148] for instance, stated that "[a] federal court should pause long and hard before declaring unconstitutional a statutory provision that is the product of such lengthy inquiry and detailed findings."[149] In contrast to the deference afforded to Congress by the *Ericson* court, the Fourth Circuit stated in *Gibbs v. Babbit*[150] that "[i]t is *our . . . duty* [as a court] to independently evaluate whether 'a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce.'"[151] This statement seems to express the import of *Lopez* where the Supreme Court indicated it would not simply defer to Congress' unstated and undocumented conclusion that there is such a rational basis but will conduct its *own* "independent evaluation"[152] of the connection to commerce. The Court arguably expressed an eagerness to examine legislative findings in evaluating the congressional judgment.[153] Although

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[146] Anisimov v. Lake, 982 F. Supp. 531, 534 (N.D. Ill. 1997) (footnote and citations omitted).

[147] Fine, *supra* note 78 at 267; *see Anisimov*, 982 F. Supp. at 534 (stating that "the Supreme Court has taken a highly deferential approach to congressional determinations that a regulated activity substantially affects interstate commerce").

[148] 45 F. Supp. 2d 344 (S.D.N.Y. 1999) (holding the civil rights provision constitutional under the Commerce Clause).

[149] *Id.* at 346; *see also* Lustig, *supra* note 7, at A4 (stating that "[p]ost-1937 case law . . . established that it was the task of Congress, with its greater institutional capacity for gathering evidence and taking testimony, and not the Court, to determine if there was a sufficient causal connection between the regulated activity and its affect on interstate commerce").

[150] 214 F.3d 483 (4th Cir. 2000), *cert. denied*, Gibbs v. Norton, 2001 WL 137648.

[151] 214 F.3d at 490 (emphasis added) (citation omitted).

[152] United States v. Lopez, 514 U.S. 549, 562 (1995).

[153] *Id.* Justice Souter, dissenting in *Morrison*, stated that under the majority's analysis "the 'substantial effects' analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort,

such findings are not required and a statute could be upheld without them, the *Lopez* Court stated that their presence would be helpful when an activity's nexus to interstate commerce was not "visible to the naked eye."[154] However, as *Morrison* made abundantly clear, the presence of congressional findings still may not change the outcome of a case. If findings are not to be looked at more than superficially, what is actually embodied in the Court's "independent evaluation" still remains to be seen after *Morrison*.[155]

Although the language in *Lopez* suggested that the standard of review being employed might be slightly higher than a simple rational basis test in evaluating regulation of non-economic activity – "rational basis" by Congress *plus* an "independent evaluation" by the Court pursuant to its own criteria – the Court did not affirmatively reject the rational basis test as the sole standard of review.[156] Hence, Section 13981 could have been evaluated under the rational basis test with the congressional findings supporting Section 13981 obviating the necessity for an "independent

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dependent upon a uniquely judicial competence." *Morrison*, 120 S. Ct. at 1764 (Souter, J., dissenting).

[154] *Lopez*, 514 U.S. at 563; *see also* Rauschl, *supra* note 143, at 1610 (stating that the Supreme Court in *Lopez* held "that it did not require congressional findings, but suggested that they would be helpful when a regulated activity's nexus to interstate commerce was not 'visible to the naked eye'") (footnote omitted).

[155] *See, e.g.*, Peter Arey Gilbert, *The Migratory Bird Rule After* Lopez: *Questioning the Value of State Sovereignty in the Context of Wetland Regulation*, 39 WM. & MARY L. REV. 1695, 1721 (1998) (commenting that "*Lopez*['s] analysis reflects the Court's newfound willingness to add factors to the Commerce Clause analysis").

[156] Seaton v. Seaton, 971 F. Supp. 1188, 1193 (E.D. Tenn. 1997) (stating "since *Lopez* did not overturn or limit the rationality test under *Hodel*, the numerous hearings and substantial documentation amassed by Congress evinced a rational basis for finding that gender-based violence sufficiently affected interstate commerce") (citation omitted); Renshaw, *supra* note 3, at 833 (stating that "*Lopez* does not present a new test for Commerce Clause challenges but rather affirms the rational basis test previously used by the Supreme Court"). Even a district court that invalidated the civil rights provision stated that "in the wake of *Lopez*, the proper standard of review remains the . . . 'rational basis test'." Bergeron v. Bergeron, 48 F. Supp. 628, 634 (M.D. La. 1999).

evaluation" by the Court. Despite numerous district courts having evaluated Section 13981 using the rational basis test in conjunction with Congress' findings,[157] nowhere in the *Morrison* Court's opinion did it even mention "rational basis." Therefore, it is evident that the Court employed a new standard of review, or at least adhered to the unarticulated standard that it propounded in *Lopez*.

Justice David H. Souter, dissenting from the majority in *Morrison*, recounted the voluminous findings Congress amassed prior to enacting the civil rights provision, and stated that "the sufficiency of the evidence before Congress to provide a rational basis for the finding [that gender-motivated violence substantially effects interstate commerce] cannot seriously be questioned."[158] Justice Souter correctly observed that:

> Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them.[159]

Given Justice Souter's comments and the analysis above, it is clear that the *Morrison* Court adopted a new standard of scrutiny. Its newly crafted independent evaluation consists of zero deference to congressional findings while the Court conducts its own independent evaluation as to the regulated activity's connection to interstate commerce with principles of federalism serving as a guard against plenary congressional power.

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[157] *See Anisimov*, 982 F. Supp. at 539 (stating that "the role of the courts . . . is to ensure that Congress has a rational basis for its findings. Given the extensive compilation of data, testimony and reports, 'it is unlikely Congress would spend four years determining the effects of gender-based violence on interstate commerce for the sole purpose of overcoming the rationality test and the Supreme Court's decision in *Lopez* . . . This Court is satisfied that the congressional findings underlying the VAWA should be regarded as more than a mere pretext for congressional authority").

[158] *Morrison*, 120 S. Ct. at 1763 (Souter, J., dissenting) (citation omitted).

[159] *Id.* at 1764.

B. *The Morrison Majority (Covertly) Propounded a New Standard of Review*

The *Morrison* Court rejected the rational basis test as the sole criterion for evaluating intrastate non-economic activities[160] and propounded a new standard of review in its place.[161] It appears that the *Morrison* majority adopted the following test in evaluating the constitutionality of a statute regulating under the "substantially affects" commerce test. As noted, the Court considered four factors but its test can be compacted down into the following: First, the Court will look to see whether the statute pertains to commercial or economic activity.[162] If it regulates such an activity, it appears that the rational basis test will be employed and the statute will be almost universally upheld.[163] Under such scrutiny congressional findings, if present, will be afforded deference. If the statute does

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[160] *See, e.g., id.* (stating that the majority's affording Congress' findings less deference "are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review").

[161] *See* Lustig, *supra* note 7, at A4 (commenting that "[b]lithely ignoring and rejecting existing precedent, the court in both [*Lopez* and *Morrison*] . . . adopted a form of 'strict scrutiny' of Congressional legislation in which the Court substituted its own judgment in place of the legislature as to the casual connection between the activity regulated by Congress and its affect on interstate commerce in place of the legislature").

[162] *Morrison*, 120 S. Ct. at 1749-50. This contention is precisely what Justice Souter argued in his dissenting opinion in *Lopez* and is the same theme he again picked up in his dissent in *Morrison*. In his *Lopez* dissent Souter argued that the *Lopez* majority "treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation." 514 U.S. at 608. *See also* Philpot, *supra* note 62, at 782 (stating "in *Lopez*, the majority upset the traditional analysis by suggesting that less deference to legislative findings is necessary when the activity regulated is non-commercial in nature").

[163] *See* Megan Weinstein, *The Violence Against Women Act After* United States v. Lopez: *Defending the Act From Constitutional Challenge*, 12 BERKELEY WOMEN'S L.J. 119, 124 (1997) (stating that "[t]o be constitutional under the *Lopez* rationale, the intrastate instances of violence against women that section 13981 seeks to regulate must be deemed commercial").

not regulate economic activity, then the Court will look for a jurisdictional hook.[164] If one is not present, then an undefined heightened scrutiny or "independent evaluation" will be applied by the Court. Under such heightened review, legislative findings are given little to no weight as the Court evaluates the reasoning behind the findings. The *Morrison* Court seemingly requires a fairly tight nexus between the regulated activity and its connection to interstate commerce.[165] The court in *United States v. Visnich*,[166] evaluating the constitutionality of 28 U.S.C. 922(q) subsequent to *Morrison* being decided, stated that:

> [T]he [*Morrison*] Court focused more on the actuality of the relationship between the regulated activity and interstate commerce, and less on the legislatively-stated link between the two. This is neither a change nor a modification in Commerce Clause jurisprudence, but merely a change in emphasis on one of the several factors the Court considers in evaluating legislation based upon Congress' Commerce Clause powers.[167]

The *Visnich* court deemed the *Morrison* Court to require a "substantial nexus between the regulated activity and interstate commerce."[168] The *Visnich* court correctly interpreted the *Morri-*

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[164] *See, e.g.*, United States v. Fleischli, 119 F. Supp. 2d 819, 822 (C.D. Ill. 2000) ("The [*Morrison*] Court, . . . was careful to note that a principal infirmity of . . . § 13981 was that the legislation 'contain[ed] no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce.' . . . . [and] that 'such a jurisdictional element would lend support to the argument that . . . § 13981 is sufficiently ties to interstate commerce'") (citations omitted).

[165] *See* United States v. Visnich, 109 F. Supp. 2d 757, 760 (N.D. Ohio 2000) (stating "*Morrison* does place more emphasis on the nexus between the regulated activity and interstate commerce"); *see also* Polly McCann Pruneda, *The Lautenberg Amendment: Congress Hit the Mark by Banning Firearms*, 30 ST. MARY'S L.J. 801, 820 (1999) (noting that "the Court's modern approach to the Commerce Clause . . . partially revives the requirement that Congress demonstrate a clear nexus between the regulated intrastate activity and interstate commerce").

[166] 109 F. Supp. 2d 757 (N.D. Ohio 2000).

[167] *Id.* at 761 (footnotes omitted).

[168] *Id.* at 761 n.5.

son Court's heightened scrutiny to require such a connection. Moreover, the *Morrison* Court viewed Section 13981 in its evaluation through the lens of federalism, being concerned over possible federal intrusion into areas perceived as being within the realm of the states alone to regulate.[169]

The *Morrison* Court adopted the *Lopez* Court's directive that the Court must undertake its own independent evaluation of a regulated activity's connection to interstate commerce and not merely accept Congress' findings as conclusive as to this nexus. The *Morrison* Court was vague, however, in articulating what its "independent evaluation" actually consists of – that is, how much weight findings receive and how much concerns about federalism should play.

C. *The Morrison Majority Tacitly Adopted a Per Se Rule Against Commerce Clause Regulation of Intrastate Non-Economic Activities*

Although the *Morrison* Court claimed that "[it] need not adopt a categorical rule against aggregating the effects of any non-economic activity,"[170] it is evident that the Court, by its logic, in fact did do so.[171] The Court also added a caveat, justifying this statement, by stating that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature."[172] Justice Breyer,

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[169] *See Morrison*, 120 S. Ct. at 1753.

[170] *Id.* at 1751.

[171] *Id.*, at 1765 (Souter, J., dissenting). Justice Souter opined:

> [F]or the majority, not only that there must be some limits to 'commerce,' but that some particular subjects arguably within the commerce power can be identified in advance *as excluded*, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power.

Id. (emphasis added). *See* Alan J. Heinrich, *Symposium on New Directions in Federalism*, 33 LOY. L.A. L. REV. 1275, 1276 (2000) (observing that "[u]nder *Morrison*, it will be virtually impossible for Congress to regulate noneconomic activity pursuant to its Commerce Clause power").

[172] *Morrison*, 120 S. Ct. at 1751 (citation omitted).

dissenting as well in *Morrison*, deemed the Court's holding to be that "the federal commerce power does not extend to such 'noneconomic' activities as 'noneconomic, violent criminal conduct' that significantly affects interstate commerce only if we 'aggregate' the interstate 'effect[s]' of individual instances."[173]

The *Morrison* majority rejected Congress' findings, holding that they consisted of attenuated "but-for" reasoning, which, if accepted, would potentially leave no area outside Congress' reach.[174] The only way to know for sure whether the Court did not adopt a categorical rule against upholding the regulation of an intrastate activity that is claimed in the aggregate to substantially affect commerce would be for a case to come before the Court which would require the Court to evaluate a statute that did not have the so-called causation problems of Section 13981.

IV. PROPOSED STANDARD OF REVIEW FOR INTRASTATE NON-ECONOMIC ACTIVITIES

In lieu of the undefined standard the Court used in *Morrison*, a new standard of review under the Commerce Clause needs to be articulated to evaluate those intrastate activities that are claimed to substantially affect interstate commerce in the aggregate. The standard this Note proposes would simply articulate the undefined aspects of the *Morrison* test.

First, a heightened standard of review should be adopted for statutes that attempt to regulate non-economic intrastate activity and are claiming to substantially affect interstate commerce in the

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[173] *Id.* at 1774 (Breyer, J., dissenting) (internal citation omitted).

[174] *Id.* at 1751. The *Morrison* majority stated that:

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. 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. (citation omitted).

aggregate. This would be in lieu of the rational basis test, which should remain the test to evaluate those statutes that attempt to regulate commercial activities under the "substantially affects commerce" test. Under this proposed standard, congressional findings that a non-economic activity substantially affects interstate commerce would receive little or no deference, unlike the treatment they would receive with regard to commercial activities.[175] This approach would not differ with the treatment the *Morrison* Court gave the congressional findings. This demarcation between economic and non-economic activities would stem from prudential concerns over federalism and the desire to draw a line demarcating what Congress can regulate under the Commerce Clause.

Such a heightened standard of review is prefered over the rational basis test simply because of the fact that Congress' Commerce Clause powers are not plenary and there must be limits under our traditional concepts of federalism. Federalism is a vital component to the structure of our national Government.[176] Therefore, as Congress attempts to regulate those activities that appear further and further removed from commerce – intrastate non-economic activities that are claimed to substantially affect commerce in the aggregate – judicial scrutiny should be more rigorous

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[175] *See, e.g.*, Lisanne Newell Leasure, *Commerce Clause Challenges Spawned by* United States v. Lopez *Are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate Over How the VAWA Will Fare in the Wake of Lopez*, 50 ME. L. REV. 410, 433 (1998) (commenting that "Justice Souter highlighted the fact that [the *Lopez*] majority upset the traditional analysis by indicating that less deference to legislative findings is appropriate when the regulated activity is non-commercial in nature") (footnotes omitted).

[176] *See* Gregory v. Ashcroft, 501 U.S. 452 (1991). In *Ashcroft*, Justice O'Connor enumerated the virtues of federalism as follows:

> It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. Perhaps the principle benefit of the federalist system is a check on abuses of government power.

Id. at 458 (citations omitted).

as to the activities' connection to interstate commerce. However, Congress should not be foreclosed completely from regulating such if it can meet the Court's independent evaluation of there being a substantial nexus between the activity and its impact on interstate commerce. Congressional findings should receive little to no deference when they concern non-economic activities. The reason for this is if Congress only had to accumulate extensive findings in order to establish such a connection between the regulated activity and interstate commerce, the Court logically cannot refute this claim and say Congress' decision was irrational and invalidate the legislation. If congressional findings received the same amount of deference as they do with review of commercial activities, their accumulation otherwise would simply serve as pre-requisite to a court administered rubber stamp to permit regulation under the Commerce Clause and judicial review would become moot.[177] It is for this reason that congressional findings should not be deferred to.

If the rational basis test had been honestly employed by the *Morrison* Court, then the Court should have upheld the civil rights provision just as numerous district courts had done.[178] It would

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[177] *See, e.g.*, United States v. Kirk, 105 F.3d 997, 999 (5th Cir. 1997) (stating that "[c]ongressional findings are not merely playthings of formalism").

[178] *See, e.g.*, Liu v. Striuli, 36 F. Supp. 2d. 452, 477 (D.RI. 1999) (stating "this Court cannot conclude that Congress had no rational basis for finding that gender-motivated violence substantially affects interstate commerce"); Williams v. Bd. of County Comm'rs of the Unified Gov't of Wyandotte County / Kansas City, Kansas, 1999 WL 690101, at *3 (D.Kan. Aug. 24, 1999); Kuhn v. Kuhn, 1999 WL 519326, at *10 (N.D. Ill. July 15, 1999) (concluding that "Congress . . . had a rational basis to conclude that gender-motivated violence substantially affects interstate commerce"); Ziegler v. Ziegler, 28 F. Supp. 2d 601, 611 (E.D.Wa. 1998) (stating "[t]his Court joins almost all other District Courts which have addressed the issue in concluding that the Congressional finding has a rational basis") (citations omitted); Crisonino v. N.Y.C. Hous. Auth., 985 F. Supp. 385, 396 (S.D.N.Y. 1997) (concluding that Congress had a rational basis for concluding that gender-motivated violence substantially affects interstate commerce); Doe v. Hartz, 970 F. Supp. 1375, 1422 (N.D. Iowa 1997) (stating that "this court finds that there was undeniably a rational basis for Congress's conclusions that gender-motivated violence has a substantial effect on interstate commerce") (citation omitted), *reversed in part, vacated in part* 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608, 610 (D.Conn. 1996) (concluding

have been difficult for the *Morrison* Court to conclude that Congress, after holding years of hearings and accumulating a plethora of findings purporting to establish the effect gender-motivated violence has on interstate commerce, was irrational in reaching its conclusion.[179] Therefore, the Supreme Court should adopt a heightened standard of review for intrastate non-economic activities, under which congressional findings would receive little to no deference and federalism concerns would play a critical role in the evaluation.[180] This would be in contrast to judicial review of statutes that attempt to regulate commercial activities which would still be subject to the rational basis test and congressional findings would be deferred to.

CONCLUSION

If *Lopez* merely muddled the proverbial waters of Commerce Clause jurisprudence,[181] leaving questions unanswered,[182] then *Morrison* followed in *Lopez's* wake creating even more chaos for

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that "[a] rational basis exists for concluding that gender-based violence . . . is a national problem with substantial impact on interstate commerce and thus is a proper exercise of congressional power under the Commerce Clause").

[179] *See, e.g.*, Doe v. Mercer, 37 F. Supp. 2d. 64, 68 (D.Mass. 1999) (stating that "while legislative findings are not conclusive, they are, under the extremely deferential test used to evaluate the exercise of Congress's power under the Commerce Clause, deserving of the utmost respect"); Goldscheid, *supra*, note 39 at 123 (stating that the *Morrison* Court "did not deem irrational Congress's conclusion that gender-based violence substantially affected interstate commerce") (footnote omitted).

[180] *See, e.g.*, Rackham, *supra*, note 15, at 448 (stating "federalism still provides a meaningful check on an overpowering federal government").

[181] *See* Sara E. Kropf, *The Failure of* United States v. Lopez: *Analyzing the Violence Against Women Act*, 8 S. CAL. REV. L. & WOMEN'S STUD. 373, 373 (1999) (stating "[*Lopez*] muddled the well-settled jurisprudence of the Commerce Clause").

[182] *See* Mary C. Carty, Doe v. Doe *and the Violence Against Women Act: A Post-Lopez, Commerce Clause Analysis*, 71 ST. JOHN'S L. REV. 465, 476 (1997) (stating that "*Lopez* did not clearly announce what form of heightened judicial review is appropriate") (footnote omitted); Reynolds, *supra* note 181, at 374 (commenting that "[t]he [*Lopez*] majority opinion is notable for the questions it leaves unanswered").

an already much debated and misinterpreted doctrine.[183] What is clear, however, is that it can no longer be denied that the Supreme Court is reigning in what had developed to be a seemingly limitless power of Congress to regulate under the Commerce Clause and aggrandizing power in its own hands.[184]

Almost immediately after the *Morrison* decision was announced, district courts began dismissing cases brought under the civil rights provision[185] and rejecting challenges to other statutes.[186] This increased judicial activity is reminiscent of what

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[183] *See* Lustig, *supra* note 7, at A4 (stating "both *Lopez* and *Morrison* . . . turned the prevailing Commerce Clause jurisprudence on its head"); *See* Burdett, *supra* note 11, at 1221 (stating that "the *Morrison* decision has sparked a variety of emotions in commentators across the country"); Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 136 (2000) (stating that "[o]n its most obvious level, *Morrison* represents the high-water mark to date of this Court's specific notion of federalism"). Moreover, Senator Biden stated that "[t]he damage done to the act is not as bad as the damage done to American jurisprudence." Linda Greenhouse, *Women Lose Right to Sue Attackers in Federal Court,* NY TIMES, May 16, 2000 at A20 (quoting remarks of Senator Biden).

[184] *See* Lustig, *supra* note 7, at A1 (stating "[with *Lopez* and *Morrison*] the Court has exhibited judicial activism in its most extreme form"); Jennifer L. Wethington, *Constitutional Law-Commerce Clause-Violence Against Women Act's Civil Rights Remedy Exceeds Congress's Powers to Regulate Interstate Commerce.* United States v. Morrison, 120 S. Ct. 1740 (2000), 23 U. ARK. LITTLE ROCK L. REV. 485, 507 (2001) (suggesting that with *Morrison*, the Supreme Court shifted power away from Congress and to itself upsetting "the delicate federal balance in favor of heightened judicial review of Congress's actions").

[185] *See, e.g.*, Blair v. All Stars Sports Cabaret, 98 F. Supp. 2d 1223, 1224 (2000) (dismissing plaintiff's VAWA cause of action).

[186] *See, e.g.*, United States v. Feliciano, 2000 WL 1194237 (2d Cir. Aug. 16, 2000) (challenging constitutionality of 18 U.S.C. § 1959); United States v. Visnich, 109 F. Supp. 2d 757 (2000) (rejecting a constitutional challenge to 18 U.S.C. § 922(g)); United States v. City of Columbus, 2000 WL 1133166 (S.D. Ohio Aug. 3, 2000), at *4 (concluding that 42 USC § 14141 "cannot be justified as a valid exercise of congressional authority under the Commerce Clause"). There is also concern that federal environmental regulation passed under the Commerce Clause might be vulnerable to invalidation due to *Morrison. See* John H. Turner, Lopez *Lives: Can an Expansive View of Federal Wetlands Regulation Survive? An Overview of Decisions Regarding the 'Proactive' Reach of the Commerce Clause,* SE88 ALI-ABA 197, 199 (May 31, 2000) (stating that

occurred just after the *Lopez* decision was announced.[187] Many of these cases have adopted the *Morrison* Court's recognition that federalism is alive and well[188] and that there are simply things that must be considered to be solely in the realm of state concern.[189]

Ultimately, by establishing a heightened standard of review for intrastate non-economic activities, and not simply adopting an untenable per se rule,[190] the Court can articulate the location of the edge of the proverbial Rubicon that Congress will not be allowed to cross in enacting legislation under the Commerce Clause, unless it can pass the Court's independent evaluation. However, a per se rule is an unacceptable solution as Congress

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"[r]ecent Court decisions have led to considerable speculation that the federal environmental statutes may no longer be on sound constitutional footing").

[187] *See* Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. . . . 922(G)(9)*, 19 PACE L. REV. 445, 482 (1999) (stating that "[u]pon the United States Supreme Court's rendering its decision in . . . *Lopez*, the legal community vehemently challenged any Congressional enactment as a usurpation of Congress's power under the Commerce Clause") (footnote omitted).

[188] *See, e.g.*, United States v. Wang, 222 F.3d 234, 240 (6th Cir. 2000). Following suit, the *Wang* court stated:

> The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

Id. at 240 (citing *Morrison*, 120 S. Ct. at 1754).

[189] *See, e.g.*, Chang v. S. Maxwell, 102 F. Supp. 2d 316, 318 (D. Md. 2000) (concluding that "disagreement[s] over control of . . . trusts . . . in the context of divorce and child custody disputes that are clearly matters of state rather than of federal concern") (citing United States v. Morrison, 120 S. Ct. at 1777).

[190] *See* Perry A. Craft & Arshad (Paku) Khan, *A Summary of the 1999-2000 U.S. Supreme Court Civil Decisions*, 36-OCT TENN. B.J. 18, 22 (2000) (stating that "[u]nder the Commerce Clause, Congress may only regulate local economic activities substantially affecting interstate commerce").

should be afforded some maneuverability to potentially regulate matters that are national in scope although they might be classified as non-economic intrastate activity. The reason for this is that as American society continues to evolve, Congress should have regulatory flexibility[191] – as it had when the nation developed in the twentieth century[192] – just not as expansive as then,[193] and kept in check by the Court. The Court needs though to articulate the factors encompassed in its independent evaluation so that Congress has some guidance in legislating. It is undeniable that the civil rights provision of the Violence Against Women Act was passed for laudable objectives, but, if *Lopez* and *Morrison* mean anything at all – despite their confusion – it is that "the power to regulate commerce, though broad . . . has limits."[194]

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[191] *Cf.* Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 1012 (2000) (commenting that the Supreme Court has placed "new-found limitations on congressional regulatory authority") (footnote omitted).

[192] *See* David C. Feola and David R. Fine, *The "New Federalism": Ignore It at Your Peril*, 29-NOV. COLO. LAW. 5 (2000) (stating that "[t]he Supreme Court, throughout most of the twentieth century, has used the Commerce Clause to expand power over a wide range of commercial and social activity").

[193] *See, e.g.*, Burdett, *supra* note 11, at 1221 (stating that "*Morrison* is viewed by many as a 'watershed case,' as it 'denigrates congressional power to a level not seen since the 1930s'") (footnote omitted).

[194] United States v. Lopez, 514 U.S. at 557 (internal citation marks and citation omitted).