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The Violence against Women Act after United States v. Lopez: Will Domestic Violence Jurisdiction Be Returned to the States

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THE VIOLENCE AGAINST WOMEN ACT AFTER UNITED STATES v. LOPEZ: WILL DOMESTIC VIOLENCE JURISDICTION BE RETURNED TO THE STATES?¹

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I. INTRODUCTION

On June 13, 1994, a double murder in Southern California² created more than a year's worth of sensational headlines and put the problem of domestic violence in the national spotlight. The bodies of Nicole Brown Simpson and Ronald Goldman were found stabbed to death outside Simpson's condominium. Several days later, police arrested Nicole Brown Simpson's ex-husband, football star O.J. Simpson, and charged him in the double murder.³ Almost immediately, the media revealed Simpson's history as an abusive

¹The author thanks Professor S. Candice Hoke for her assistance in this project.

²Eric Malnic & Josh Meyer, *O.J. Simpson's Ex-Wife, Man Found Slain*, L.A. TIMES, June 14, 1994, at C1.

³Jim Newton & Shawn Hubler, *Simpson Held After Wild Chase, He's Charged With Murder of Ex-Wife, Friend*, L.A. TIMES, June 16, 1994, at A1.

husband.⁴ Recordings of a fearful Nicole Brown Simpson telephoning the emergency 9-1-1 center, relating her distress over an impending attack by her ex-husband, were broadcast across the world. Prosecutors used this history of domestic violence to paint Simpson as a jealous and obsessive former husband who killed the pair in a fit of rage. Although a jury eventually acquitted Simpson of the murder charges,⁵ the effects of this nationwide focus on domestic abuse remain.

About two months after the Simpson murders and after four years of debate,⁶ Congress passed the Violence Against Women Act⁷ [hereinafter the VAWA or the Act] as Title IV of the Violent Crime Control and Law Enforcement Act of 1994⁸ [hereinafter 1994 Crime Bill]. Critics immediately hailed this new domestic violence legislation as a politically motivated response to recent widespread publicity surrounding domestic violence.⁹ Although little doubt exists that this country needs to reduce domestic violence, this sweeping federal legislation may not be the most effective means.

While the policy debate continues to be waged over the legislative wisdom in enacting the VAWA, a legal controversy over its constitutionality is being faced in federal district courts. Solely because Congress exceeded its authority under the Commerce Clause, the Supreme Court in *United States v. Lopez*¹⁰ invalidated the Gun-Free School Zones Act of 1990,¹¹ a federal statute banning the possession of firearms on or near school property. Noting this "dramatic shift in its approach to constitutional federalism,"¹² commentators immediately began speculating that other federal laws, including the VAWA,

⁴Josh Meyer, *Police Records Detail 1989 Beating That Led To Charge Violence*, L.A. TIMES, June 17, 1994, at A24.

⁵Jim Newton, *Simpson Not Guilty; Drama Ends 474 Days After Arrest*, L.A. TIMES, Oct. 4, 1995, at A1.

⁶The Violence Against Women Act was first introduced in the 101st Congress as S. 2754 in the Senate and as H.R. 5168 in the House. Three hearings were held during 1990 in the Senate Committee on the Judiciary featuring testimony of law enforcement officials, university professors and operators of rape crisis centers and battered womens' shelters. This testimony addressed the problem of violence against women and the need for federal legislation to combat it. See H.R. Rep. No. 395, 103d Cong., 1st. Sess. 26-28 (1993).

⁷The Violence Against Women Act of 1994, Pub. L. No. 103-322, secs. 4001-40703 (codified in 108 Stat. 1902-55 and various sections of 28 and 42 U.S.C.).

⁸Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. (now codified in various sections of the United States Code).

⁹See Patricia Edmonds & Linda Kanamine, *Messages Mixed on Domestic Violence*, USA TODAY, Oct. 5, 1995, at 2A.

¹⁰115 S. Ct. 1624 (1995).

¹¹18 U.S.C.A. § 922(q)(1)(A)(West 1995).

¹²Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1789 (June 1995).

would be invalidated as a result of this decision.¹³ As discussion continues over the overall effects of *Lopez*, federal courts have already shown a willingness to use the decision in finding that Congress has exceeded its powers in enacting other federal legislation.

Although the VAWA withstood its first federal court challenge,¹⁴ a portion of the legislation was found unconstitutional just weeks later by another federal district court.¹⁵ This Note argues that portions of the Violence Against Women Act will continue to be struck down on Commerce Clause grounds. Furthermore, domestic relations and domestic violence are areas of the law that have traditionally been most effectively regulated by the States. While the problem of domestic violence in our nation is indeed significant, the new federal legislation is unlikely to provide viable solutions. Perhaps the only portions of the Act passing constitutional muster are those provisions which provide money to the States to assist in their efforts aimed at domestic violence prevention and prosecution. Whereas this Note reasons that the Commerce Clause power does not extend so far as to authorize the VAWA, it also recognizes that the States are capable of actively pursuing solutions to our nation's domestic violence problem.

II. DOMESTIC VIOLENCE & CONGRESSIONAL ACTION

Domestic violence has been called the "leading cause of injury to American women,"¹⁶ resulting in approximately 1,400 deaths per year.¹⁷ In 1992, the American Medical Association declared domestic violence against women a national epidemic requiring a response from health officials and suggested that doctors routinely screen female patients for signs of abuse.¹⁸ Lawmakers studying the VAWA found that thirty-five percent of hospital emergency room visits by women are due to domestic violence.¹⁹ Recent Justice Department statistics show that females experience ten times as many attacks at the hands of an intimate associate than do males.²⁰ Among women who experienced

¹³*Id.*

¹⁴*Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996), to be discussed *infra* throughout this Note.

¹⁵*Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996), to be discussed *infra* throughout this Note.

¹⁶See *New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1546 (1993) (citing Antonia C. Novello, From the Surgeon General, U.S. Public Health Service, 267 JAMA 3132 (1992)).

¹⁷Margaret Carlson, *Preventable Murders*, TIME, Oct. 16, 1995, at 64.

¹⁸Jill Smolowe, *What The Doctor Should Do. (American Medical Association Creates Guidelines For Dealing With Domestic Violence)*, TIME, June 29, 1992, at 57.

¹⁹H. R. Rep. No. 395, *supra* note 6, at 26.

²⁰U.S. Dep't of Justice, Pub. No. NCJ-145325, *Violence Against Women: A National Crime Victimization Survey Report* (1994). On average, women experienced 572,032

attack, injuries occur almost twice as frequently when the offender was an intimate associate than when the perpetrator was a stranger.²¹

Although domestic violence was increasingly being recognized as a serious problem before the Simpson and Goldman murders, the case provided the impetus to push the issue to the national forefront and to prompt thousands of women to seek help. In Los Angeles County, felony abuse cases rose from 970 in 1991 to 2,154 in 1994.²² According to the National Center for State Courts, thirty percent of women who filed civil orders against their batterers were influenced by the Simpson case.²³ Even after the October 1995 verdict, calls to domestic violence shelters remained high. An Oregon crisis line reports that calls tripled on the day of the verdict and have remained consistently high.²⁴

While stringent laws are vital, enforcement of such measures is essential to alleviate this national problem. Lawmakers studying the VAWA admit that "our legal system has historically failed to address violence against women with appropriate seriousness."²⁵ Many observers claim that judges do not take domestic violence cases seriously²⁶ and that batterers are often quickly released from overcrowded jails.²⁷ Whether federal legislation will be any more effective or desirable than current state law²⁸ in quelling public outcry to stop domestic abuse remains debatable.

A. *The Violence Against Women Act*

A House Report on the VAWA states that the legislation is "based on a recognition that law enforcement efforts against domestic violence and rape have been insufficient."²⁹ The multi-faceted Act provides, for the first time, a

violent attacks by intimates, compared to 48,983 incidents reported by men. *Id.*

²¹*Id.*

²²Ted Gest & Betsy Streisand, *Still Failing Women? The Justice System Hasn't Improved Much in Fighting Domestic Violence*, U.S. NEWS & WORLD RPT., June 19, 1995, at 54.

²³*Id.*

²⁴Chastity Pratt, *Aid Calls Rise in Wake of Simpson Acquittal*, PORTLAND OREGONIAN, Oct. 16, 1995, at B1.

²⁵H.R. Rep. No. 395, *supra* note 6, at 27.

²⁶Gest & Streisand, *supra* note 22. The article mentions a California judge who suggested that Nicole Azzalina drop charges against a former boyfriend who had repeatedly beat her. She was killed three weeks later. This case is included in a training course for judges on CD-ROM issued by The Family Violence Prevention Fund. *Id.*

²⁷*Id.*

²⁸According to a 1994 Harris Poll, while 56% of those polled answered crime and violence when asked, "What do you think are the two most serious problems facing the country?," only 36% offered the same response when asked, "What do you think are the two most important issues for the government to address?" See U.S. DEPT OF JUSTICE, THE SOURCEBOOK 155 (1993).

²⁹H.R. Rep. No. 395, *supra* note 6, at 25.

federal civil rights remedy aimed at gender-based crime³⁰ that would allow a victim to bring a federal claim for "any act that would be considered a felony, including rape and spouse abuse, regardless of whether any criminal charges have been brought."³¹ The Act also criminalizes at the federal level the offense of crossing state a line to commit an act of domestic violence³² or to violate a protection order,³³ but does not extinguish state criminal actions for the same conduct. The Act also provides \$800 million in grants to states, local governments and Indian tribes to improve law enforcement, prosecution, education, and victims services in domestic abuse cases,³⁴ although debate continued into late 1995 over whether Congress will allocate this funding.³⁵ Proponents of the Act, such as the National Organization for Women, call the measure "the most comprehensive federal response to this problem that has ever been attempted."³⁶

³⁰42 U.S.C.A. § 13981 (West 1995). The short title is "Civil Rights Remedies for Gender-Motivated Violence Act." Subsection (a) says the purpose of the subtitle is "to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." 42 U.S.C.A. § 13981 (a) (West 1995).

³¹Henry J. Reske, *An Untested Remedy For Abused Women*, A.B.A.J., Jan. 1995, at 20.

³²18 U.S.C.A. § 2261 (West 1995)

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

Penalties include life in prison if death of an offender's spouse results, up to 20 years if the attack results in "permanent disfigurement" or "life threatening bodily injury," up to 10 years in prison if an attack results in "serious bodily injury" or a "dangerous weapon" is used in the attack, or up to five years in any other case. *Id.*

³³See 18 U.S.C.A § 2262 (West 1995).

³⁴42 U.S.C.A. § 3786 (West 1995), 42 U.S.C.A. § 3793 (West 1995). See also NOW LEGAL DEFENSE AND EDUCATION FUND, *THE VIOLENCE AGAINST WOMEN ACT*, Sept. 1994.

³⁵Responding to President Bill Clinton's veto of the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1996, Rep. Susan Molinari of New York said, "I rise today to express my strong disappointment with President Clinton's veto of this bill. This bill included full finding for the Violence Against Women Act; \$175 million to protect women and children from abuse. That is an increase of 573 percent from last year." 141 Cong. Rec. H15239-01 (daily ed. Dec. 20, 1995) (statement of Rep. Molinari).

³⁶Rorie Sherman, *Domestic Abuse Bills Gain Momentum in Legislatures: The Violence Against Women Act Has Lingered On the Hill for Four Years*, NAT'L L.J., July 4, 1994, at A9, (quoting Sally Goldfarb, a NOW Legal Defense and Education Fund attorney).

Despite considerable congressional testimony contending that the legislation is necessary,³⁷ the VAWA provisions appear to be relatively untested.³⁸ In a May 1996 Senate Judiciary Committee hearing, Senator Orrin Hatch, a supporter of the Act, expressed concern over the small number of VAWA prosecutions.³⁹ Attorney General Janet Reno did not respond when Hatch asked her how many VAWA prosecutions there had been, but Justice Department figures compiled later that day showed that there had been fourteen.⁴⁰

The first VAWA conviction occurred on May 23, 1995. A federal jury in Charleston, West Virginia convicted Christopher Bailey under a criminal portion of the Act, section 2261, which federalized the offense of crossing a state line when committing an act of domestic violence.⁴¹ Prosecutors claimed that Bailey beat his wife then kept her unconscious in his car trunk while he drove for six days around West Virginia, Kentucky and Ohio.⁴² In September 1995, a federal judge sentenced Bailey to the maximum twenty year penalty for violating section 2261, plus a life sentence for kidnapping.⁴³ As of late 1995, at least one other case under 2261 was pending.⁴⁴

³⁷The following hearings were held before the Senate Judiciary Committee on violence against women: Women and Violence (June 20, 1990), Violence Against Women (Aug. 29, 1990), Domestic Violence (Dec. 11, 1990), Violence Against Women: Hate Crimes (Apr. 9, 1991), Violence Against Women: A Week in the Life of America (Feb. 4, 1992), Legislative Answers to Stalking (Sept. 29, 1992), Violence Against Women, field hearing held in South Portland, Maine (Nov. 12, 1993), Violent Crimes Against Women, field hearing held in Salt Lake City, Utah (Apr. 13, 1993), Domestic Violence, field hearing held in Boston, Mass. (Feb. 1, 1993), Anti-Stalking Proposals: Combatting Stalking and Family Violence (Mar. 17, 1993), The Response to Rape: Detours on the Road to Equal Justice (May 27, 1993), Putting the Violence Against Women Act into Action (Sept. 29, 1994). See *Turning The Act Into Action, The Violence Against Women Law*, S. Rep. No. 522-5, 104th Cong., 1st Sess. 43 (1994).

³⁸The few prosecutions under the VAWA became an issue in the 1996 Presidential campaign. After President Bill Clinton announced \$46 million in grants to help police across the nation combat domestic violence, his challenger Republican Bob Dole attacked Clinton for his administration's "appalling record on domestic violence" and pointed out that the Justice Department had brought only 14 prosecutions under the Act since its enactment. *Clinton Announces Grants*, CINCINNATI ENQUIRER, June 21, 1996, at A2.

³⁹George Lardner, *The Law Stops at the State Line; Ignorance, Confusion Paralyze the Cops*, THE WASHINGTON POST, June 2, 1996, at C3.

⁴⁰*Id.*

⁴¹18 U.S.C. § 2261 (West 1995). See *West Virginia; Husband Guilty in Beating*, NAT'L L. J., June 5, 1995, at A8.

⁴²*Id.*

⁴³*Man Convicted Under Domestic Violence Act Given Life Term*, LOS ANGELES TIMES, Sept. 2, 1995, at 4.

⁴⁴U.S. Attorney Rebecca Betts, the prosecutor in the Bailey case, says a second case has been filed in California. Maryclaire Dale, *Bailey Sentenced to Life in Prison*,

In December 1995, New York prosecutors announced the first apparent charge under 18 U.S.C. § 2262,⁴⁵ the VAWA provision federalizing the crime of crossing state lines to violate a protective order.⁴⁶ Wayne Hayes of Columbus, Ohio is accused of harassing his ex-wife and sending her threatening letters after she fled to New Jersey with their son.⁴⁷ In an absurd twist, Hayes is facing extradition to New York to stand trial on the charges because he reportedly used New York City's Laguardia Airport to travel to New Jersey to allegedly harass his former wife.⁴⁸

The first case under the VAWA civil rights provision was also the first to be dismissed on *Lopez* grounds. *Brzonkala v. Virginia Polytechnic and State Univ.* was filed in December 1995,⁴⁹ but was dismissed by a federal judge several months later.⁵⁰ *Brzonkala* involves an alleged rape which occurred on the Virginia Tech University campus.⁵¹ A former Virginia Tech student, Christy Brzonkala, claims two football players raped her in their dorm room in September 1994, approximately one week after the enactment of VAWA. Brzonkala did not file

CHARLESTON GAZETTE, Sept. 2, 1995, at A1.

⁴⁵18 U.S.C.A. § 2262. (West 1995).

Interstate violation of protection order

(a) OFFENSES.

(1) CROSSING A STATE LINE.—A person who travels across a State line or enters or leaves Indian country with the intent to engage in conduct that—

(A)(i) violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued; or

(ii) would violate subparagraph (A) if the conduct occurred in the jurisdiction in which the order was issued; and

(B) subsequently engages in such conduct, shall be punished as provided in subsection (b).

Id.

⁴⁶Jan Hoffman, *Man is First Charged in Spouse Abuse Law*, N.Y. TIMES ABSTRACTS, Dec. 22, 1995, at 6.

⁴⁷Haye's indictment was announced on December 21, 1995. *Id.*

⁴⁸*Charged Under Stalking Law*, NAT'L L. J., Jan. 8, 1996, at A8. That it has taken more than year to test this VAWA provision as well as the fact that Hayes is facing the charges in New York, a state that has a questionable relation to the alleged crime, adds fuel to the debate over whether all of the facets of the VAWA are necessary or desirable.

⁴⁹See 42 U.S.C. § 13981 (West 1995). *Brzonkala v. Virginia Polytechnic and State Univ.*, No. 95-1358-R (W.D. Va. filed Dec. 27, 1995). The complaint also sought relief under 20 U.S.C. §§ 1681-88 (for violation of plaintiff's civil rights under Title IX of the Education Amendments of 1972) and 42 U.S.C. § 1985 (for conspiracy to violate plaintiff's civil rights).

⁵⁰See *Brzonkala v. Virginia Polytechnic and State Univ.*, *supra* note 15.

⁵¹Betty Hayden & Jan Vertefeuille, *Ex-Student Sues Tech, 2 Players: \$8.3 Million Lawsuit Claims 3 1994 Rapes*, ROANOKE TIMES & WORLD NEWS, Jan. 3, 1996, at A1.

criminal charges against the pair but alternatively relied on the school's internal sexual assault policy.⁵²

Brzonkala's attorney, Eileen Wagner, called the suit a "test case" under the VAWA.⁵³ According to the Complaint, the alleged rapes "were motivated wholly by discriminatory animus" toward plaintiff's gender and "were not random acts of violence."⁵⁴ Wagner says that the Virginia Attorney General's Office and Virginia State Police began an investigation into the alleged rapes after hearing of the case through media reports.⁵⁵ In July 1996, District Judge Jackson L. Kiser dismissed the claims with prejudice and declared the VAWA civil rights remedy unconstitutional. Kiser concluded that "[a] reasonable adherence to Lopez reveals that the VAWA is not a proper use of the commerce power."⁵⁶

The VAWA civil rights provision is also the first portion of the Act to withstand a constitutional challenge on *Lopez* grounds. In *Doe v. Doe*,⁵⁷ plaintiff Jane Doe⁵⁸ sued her estranged husband under 42 U.S.C. § 13981, seeking damages for "deprivation of her federal right to be free from her husband's alleged gender-based violence against her." ⁵⁹ The plaintiff claims that, from 1978 to 1995, her husband subjected her to "a violent pattern of physical and mental abuse" that included throwing her to the floor, throwing sharp objects at her, threatening to kill her and destroying her property.⁶⁰ The defendant filed a motion to dismiss the complaint, challenging the constitutionality of the VAWA civil rights remedy by arguing that Congress, after *United States v. Lopez*,

⁵²*Id.* One of the alleged offenders was found guilty of sexual assault in a campus hearing last year and was suspended for two semesters. The other has had no action taken against him by the campus judicial board.

⁵³*Id.* The student is seeking \$4 million dollars in damages from the university, as well as damages for medical and psychological treatment and loss of education. She is seeking another \$4.3 million in damages from the alleged perpetrators.

⁵⁴*Brzonkala v. Virginia Polytechnic and State Univ.*, No. 95-1358-R (W.D. Va. Dec. 27, 1995)(complaint).

⁵⁵Telephone Interview with Eileen Wagner, attorney for Christy Brzonkala (Feb. 16, 1996). See also *Brzonkala v. Virginia Polytechnic Institute and State Univ.*, No. 95-1358 (W.D. Va. Dec. 27, 1995) (plaintiff's memorandum in support of her motion to sever and motion to extend time for service of complaint).

⁵⁶*Brzonkala*, 935 F. Supp. at 793.

⁵⁷929 F. Supp. 608 (D. Conn. 1996).

⁵⁸The court granted plaintiff's Motion to Proceed Under Pseudonym. Although the defendant initially had no objection to this motion, he has since filed an objection to the case proceeding under fictitious names and has moved to vacate the court's order. *Id.* at 610, n. 1.

⁵⁹*Id.* at 610.

⁶⁰*Id.*

lacked authority under the Commerce Clause to enact the statute.⁶¹ In June 1996, U.S. District Judge Janet Bond Arterton⁶² denied the defendant's motion and concluded that the VAWA "is a proper exercise of congressional power under the Commerce Clause."⁶³ The defense has apparently filed a motion asking Arterton to allow the defendant to immediately appeal the decision to the Second Circuit Court of Appeals instead of waiting for the case to be tried.⁶⁴

This Note agrees that the VAWA civil rights provision, 42 U.S.C. section 13981,⁶⁵ as well as 18 U.S.C. § 261, which elevates an act of domestic violence to a federal criminal offense if the perpetrator crosses a state line, are the VAWA provisions most susceptible to further challenge. Not only is it arguable that domestic violence has no substantial relation to interstate commerce, but the Act also infringes on areas of law traditionally left to the states: crime and domestic relations. These areas are specifically mentioned in *Lopez* as among those best left in the local arena.

The civil rights provision is especially ripe for further challenge because the provision has a specific statutory tie to the Commerce Clause, based on pre-*Lopez* interpretation.⁶⁶ Controversial since its inception, the U.S. Judicial Conference initially opposed the measure, fearing that it would be used as a "bargaining chip in divorces."⁶⁷ The *Doe* case arguably reinforces those fears. The Conference also expressed concern that the new law would flood the federal courts with new cases. Noting that in 1989 three million domestic relations cases were filed in state courts, the Conference anticipated that if one-tenth of those cases ended up on the federal courts, they alone "would

⁶¹Doe, 929 F. Supp. at 610.

⁶²Commentators have noted that the first two VAWA court rulings have split along gender lines. See David E. Rovella, *He Rules. She Rules on Violence Law*, NAT'L L. J., Aug. 12, 1996, at A8.

⁶³Mark Pazniokas, *Civil Rights of Women Upheld at Heart of Case Involving Spousal Abuse*, THE HARTFORD COURANT, June 20, 1996, at A3. Judge Arterton disagreed with the defendant's argument that *Lopez* overruled the rational basis test for determining whether federal legislation can withstand a Commerce Clause challenge. This Note disagrees with the judge's conclusion and argues that *Lopez* requires that federal legislation substantially affect interstate commerce to withstand a Commerce Clause challenge. See discussion *infra* pp. 21-25.

⁶⁴*Id.*

⁶⁵While this Note argues that portions of the VAWA should be invalidated because the Act exceeds Congress' authority under the Commerce Clause, it should be noted that there is speculation that the civil rights provision of the Act could also be found unconstitutional under the test set forth in *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), that determines the constitutionality of so-called "thought crimes" statutes.

⁶⁶See 42 U.S.C.A. § 13981(a) (West 1995). Pursuant to the affirmative power of Congress to enact this subtitle under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution.

⁶⁷Henry J. Reske, *An Untested Remedy for Abused Women*, 81 Jan. A.B.A.J. 20 (1995).

exceed all cases now pending in federal district and appeals courts."⁶⁸ In March 1993 the Judicial Conference changed its position on the bill to "no position," but continued to express its concern about the trend toward the "federalization of state law crimes and causes of action."⁶⁹

B. The Chief Justice's Opposition to VAWA

Chief Justice William Rehnquist, who wrote for the majority in *Lopez*, has long been outspoken about how the federalization of criminal law will affect the federal courts. Traditionally, the enforcement of criminal law has been a matter for state and local governments. In recent years, however, our country has seen a significant expansion of federal authority over crimes that were formerly under the realm of the states.⁷⁰ Drug and weapons offenses are two prime examples of recently federalized crimes. There are now close to 3,000 federal crimes on the books, many of them sharing jurisdiction with nearly identical state crimes.⁷¹ Critics of this federalization claim that this "creeping and foolish federal overcriminalization" is the result of congressional reaction to media coverage of dramatic crimes which produces what may be perceived as "widespread public anxiety."⁷²

The Chief Justice's criticism undoubtedly increases the likelihood that the Supreme Court would invalidate portions of the VAWA upon a Commerce Clause challenge. In his 1991 Year-End Report on the Federal Judiciary,⁷³ the Chief Justice, urging Congress to be cautious in creating new federal causes of action, singled out precisely those portions of the VAWA (then S. 15⁷⁴) that this Note claims should be invalidated, the criminal provision and the civil rights remedy. Rehnquist pointed out that,

[a]lthough supporting the underlying objectives of S.15 - to deter violence against women - the Judicial Conference opposes some

⁶⁸*Id.* Senator Joseph Biden (D-Del) responded to the statement by saying that the Act "would not involve the federal courts in domestic relations cases." *Id.*

⁶⁹*Id.*

⁷⁰See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995).

⁷¹See Michelle W. Easterling, *For Better Or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 944 (1996).

⁷²Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248 (1995). Kadish contends that the two primary problems with overfederalization of criminal law are the fact that it tends to allow Congress to duplicate state law whenever it chooses and that this results in a "wasteful duplication of resources where federal resources are desperately needed for other functions." *Id.* at 1249.

⁷³Hon. William H. Rehnquist, *1991 Year-End Report on the Federal Judiciary*, reprinted in THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1992 at 1. Rehnquist says "[m]odest curtailment of federal jurisdiction is important; equally important is self-restraint in adding new federal causes of action." *Id.* at 3.

⁷⁴S. 15 is essentially the same as the measure passed in 1994.

portions of the bill. The broad definition of criminal conduct is so open-ended, and the new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes.⁷⁵

Furthermore, Rehnquist warns that additional federal law should not be considered "unless critical to meeting important national interests" which cannot be solved through alternate means, including the state courts.⁷⁶ Obviously, the Chief Justice, while agreeing that domestic violence is a serious problem, disagrees with Congress that this is an area which requires federal intervention.

In subsequent reports, Rehnquist has reiterated the federal judiciary's concern regarding enlarging the jurisdiction of federal courts to encompass areas traditionally reserved to the states. In his 1994 Year-End Report,⁷⁷ Rehnquist says,

[t]here is considerable sentiment in the federal judiciary at the present time against further expansion of federal jurisdiction into areas which have been previously the province of state courts enforcing state laws. Part of this stems from a genuine concern about the erosion of federalism, and the traditional division of responsibility between federal courts and state courts.⁷⁸

Rehnquist concedes that Congress is the "ultimate arbiter" of questions regarding matters of federal versus state control, but adds that the future shape of the federal courts is "surely a legitimate subject for judicial input to Congress."⁷⁹

C. Opposition by Other Segments of the Legal Community

Like their federal counterparts, state judges have also criticized portions of the VAWA. In 1991, the Conference of State Judges, made up of state court leaders, sent letters to members of the Senate Judiciary Committee who were then considering passage of the VAWA. The state judges also told committee members that they fear that the civil rights measure would add a count to "nearly every divorce and domestic violence case."⁸⁰ In his statement before

⁷⁵*Id.* at 3.

⁷⁶*Id.*

⁷⁷Hon. William H. Rehnquist, *1994 Year-End Report on the Federal Judiciary*, reprinted in *THE THIRD BRANCH* (Administrative Office of the U.S. Courts), Jan. 1995, at 1.

⁷⁸*Id.* at 3. This Note agrees with those constitutional scholars who feel that the Lopez decision is a reflection of Rehnquist's frustration over his unheeded warnings to Congress regarding increasing federal jurisdiction, as well as his concern over this so-called erosion of federalism.

⁷⁹*Id.* at 4.

⁸⁰Rorie Sherman, *Federal Suits Allowed: Fears Expressed on Proposed Bill To Aid Women*,

the Senate Judiciary Committee, the President of the Conference of Chief Justices told lawmakers that the provision could have a significant impact on domestic relations cases because "it can be anticipated that this right will be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is."⁸¹

State supreme court justices say another problem with the civil rights remedy is that it allows concurrent jurisdiction.⁸² Thus, under this provision, a perpetrator could face both a federal and a state charge in connection with the same incident. The state judges fear this will "cause major state-federal jurisdictional problems and disruptions in the processing of domestic relations cases in state courts."⁸³

Significantly, members of the U.S. Justice Department who would be prosecuting those charged with VAWA offenses, also sent letters to the Senate Judiciary Committee expressing their opposition to the legislation.⁸⁴ The federal prosecutors told lawmakers that the VAWA would complicate divorce and domestic violence cases and argued that the bill was unnecessary because the states are already devising methods to combat domestic violence.⁸⁵ Since its passage, however, federal prosecutors have been forced to defend the Act upon challenge. Members of the U.S. Justice Department, in fact, assisted Jane Doe's attorney in defending the constitutionality of the VAWA civil rights remedy in *Doe v. Doe*.⁸⁶

In 1992, delegates to the American Bar Association convention expressed concern over the then-pending VAWA.⁸⁷ Federal Judge Norman L. Shapiro of the Eastern District of Pennsylvania told the group that the Act would heavily increase the workload of the federal courts.⁸⁸ Criminal attorneys told attendees that the Act would federalize a number of crimes now handled by the states, adding that no proof exists that state prosecutors have been "inadequate in pro-

NAT'L L. J., June 3, 1991, at 3.

⁸¹ *Violence Motivated by Gender: Statement on S. 15 Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993) (statement of Hon. Vincent L. McKusick, President, Conference of Chief Justices).

⁸² 42 U.S.C.A. § 13981(3) (West 1995). The federal and state courts shall have concurrent jurisdiction over actions brought pursuant to this subtitle.

⁸³ See *supra* note 81.

⁸⁴ *Id.*; see *infra* pp. 30-33.

⁸⁵ *Id.*

⁸⁶ Pazniokas, *supra* note 63.

⁸⁷ *News in Brief*, U.S.L.Wk., Aug. 18, 1992.

⁸⁸ *Id.*

secuting such offenses."⁸⁹ Other attendees expressed concern that the Act creates serious problems regarding federalism and statutory interpretation.⁹⁰

Even though members of the legal community recognize the potential problems associated with VAWA, a number of influential groups spoke out in favor of the Act, unaware of its potential constitutional flaws.⁹¹ Furthermore, a group of non-profit organizations "representing and advocating on behalf of women who have survived gender-motivated violence" were allowed to appear as amicus curiae in *Doe*.⁹² Commentators suggest that interest groups prefer federal legislation over state law for several reasons which the VAWA validates. First, passing one federal provision is less expensive than obtaining the passage of fifty state statutes. Federalization can increase attention to an issue like domestic abuse. Federal law is "often considered a higher quality product than state law" and some feel federal law is harder to avoid than state law.⁹³ While these arguments may bear true, they do not overcome well-established policy reasons demanding that domestic violence remain under the control of the states.

III. THE NEW COMMERCE CLAUSE CHALLENGE TO FEDERAL LEGISLATION

On April 26, 1995, the United States Supreme Court issued a landmark decision resulting in the rejuvenation of the Commerce Clause debate jeopardizing portions of the VAWA, as well as other federal laws. For the first time since 1936,⁹⁴ the Court invalidated a federal law under the Commerce Clause. While the longterm impact of the case remains unclear, federal courts have already used the case to challenge several federal laws.

⁸⁹*Id.*

⁹⁰*Id.* Proponents of VAWA argued that moving to go on record against the bill would make it appear as if the ABA were "hostile" to legislation designed to protect women. The ABA delegates, thus, by a hand vote, decided not to put itself on record against VAWA. *Id.* In August, 1995, the ABA's first women president, Roberta Cooper Ramo, announced at the group's annual meeting that "ensuring adequate funding for the Violence Against Women Act" is among her goals. See Karen Donovan, *American Bar Association 1st Woman President Sets Out Her Agenda*, NAT'L L.J., Aug. 7, 1995, at A5.

⁹¹See S. Rep. No. 138, 103d Cong., 1st Sess. (1993).

⁹²*Doe*, 929 F. Supp. at 610. The group includes representatives of the NOW Legal Defense and Education Fund, National Organization for Women Foundation, The Connecticut Women's Education and Legal Fund, Inc., National Coalition Against Domestic Violence, and the Pennsylvania Coalition Against Domestic Violence. *Id.* at *1, n.2.

⁹³Jonathan R. Macey, *Federal Deference To Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271-73 (1990).

⁹⁴In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court held that Congress had exceeded its authority under the Commerce Clause in enacting the Bituminous Coal Act of 1935.

A. United States v. Lopez

In *United States v. Lopez*,⁹⁵ voting five to four,⁹⁶ the Court concluded that the Gun-Free School Zone Act of 1990⁹⁷ exceeded Congress' authority under the Commerce Clause. The Court essentially rejected the statute because the activity in question did not "substantially effect" interstate commerce.⁹⁸ The Court reasoned that the statute lacked a jurisdictional element⁹⁹ or legislative history that tied it to interstate commerce.¹⁰⁰ The Court further criticized the statute by pointing out that the measure intrudes on areas of law, education and crime, traditionally under state control.¹⁰¹ Though all of these factors led to the decision, apparently the foremost requirement under *Lopez* is that an activity must substantially affect interstate commerce before Congress can intervene.

This new test for determining Congress' Commerce Clause power is designed to halt the movement toward unlimited federal power. Writing for the majority, Chief Justice William Rehnquist expressed concern regarding unbridled federal authority and intrusion into areas of law traditionally reserved to the states, saying that to side with the federal government, "[w]e 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."¹⁰²

Alfonzo Lopez is described by one scholar as an "unlikely candidate to be a federal cause celebre."¹⁰³ The twelfth grader was arrested on March 10, 1992 after arriving at his San Antonio, Texas high school carrying a concealed .38

⁹⁵115 S. Ct. 1624 (1995).

⁹⁶Justices Sandra Day O'Connor, Anthony M. Kennedy, Antonin Scalia and Clarence Thomas joined Chief Justice Rehnquist in the majority opinion. Justice Kennedy filed a concurring opinion, in which Justice O'Connor joined. Justice Thomas also filed a concurring opinion. Justices Stevens and Souter filed dissenting opinions. Justice Breyer also filed a dissenting opinion in which Justices Ginsburg, Souter and Stevens joined.

⁹⁷18 U.S.C. § 922(q)(1)(A) (1995). The Act 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." *Id.* School zone is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." § 921 (a)(25).

⁹⁸115 S. Ct. at 1632.

⁹⁹*Id.* at 1631.

¹⁰⁰*Id.* at 1631-32.

¹⁰¹*Id.* at 1633-34.

¹⁰²*Lopez*, 115 S. Ct. at 1634.

¹⁰³Kathleen Brickey, Remarks at Symposium on The New Federalism After U.S. v. Lopez (Nov. 11, 1995) (videotape available at the Case Western Reserve Law School library).

caliber handgun.¹⁰⁴ Lopez was initially charged under Texas law, but the next day federal agents charged him under the Gun-Free School Zones Act.¹⁰⁵ After waiving his right to a jury trial, a district court judge found Lopez guilty of violating 18 U.S.C. § 922(q) and sentenced him to six months imprisonment and two years supervised release.¹⁰⁶ Lopez appealed his conviction, arguing that the Act "exceeded Congress' power to legislate under the Commerce Clause."¹⁰⁷ The Court of Appeals for the Fifth Circuit agreed and reversed Lopez's conviction on the Commerce Clause challenge.¹⁰⁸ The Supreme Court affirmed, agreeing with the Fifth Circuit that possession of a gun in a local school zone did not substantially affect interstate commerce.¹⁰⁹

Lopez modifies traditional Commerce Clause analysis in several ways. Previously, the sole issue in this analysis was whether the regulated activity affected interstate commerce. The Court in *Lopez* splits this analysis into several steps and appears to add "specific protection from regulation for areas of traditional concern to the states."¹¹⁰ The Court identified three broad categories of activity that Congress can regulate under the Commerce Clause: 1) "the use of channels of interstate commerce;" 2) "the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities"; and 3) "activities having a substantial relation to interstate commerce, . . . i.e. those activities that substantially affect interstate commerce."¹¹¹ The Court sidestepped the first two categories as not germane to the case and decided that "if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce."¹¹²

In a pathbreaking discussion, the Court furthers its analysis by not only asking whether a measure substantially affects interstate commerce, but by considering the implication that accepting these arguments could have on the relationship between the federal government and the states.¹¹³ The Court pondered several strong arguments tying guns near schools to interstate commerce, including what the Court calls the Government's "costs of crime"

¹⁰⁴115 S. Ct. at 1626.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*United States v. Lopez*, 2 F.3d 1342, 1367-1368 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

¹⁰⁹*Lopez*, 115 S. Ct. 1634.

¹¹⁰See Stephen M. Mcjohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 24 (1995).

¹¹¹*Lopez*, 115 S. Ct. at 1629-30.

¹¹²*Id.* at 1630.

¹¹³Mcjohn, *supra* note 110, at 28.

and "national productivity" reasoning,¹¹⁴ but ultimately concluded that, if accepted, these arguments would grant unlimited federal power. The Court concluded that, "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."¹¹⁵ The *Lopez* decision makes clear that determining whether the regulated activity is in an area traditionally under the realm of the States is now a part of the federal commerce power analysis.¹¹⁶ As discussed later in this Note, this step will make it difficult for several statutes, including parts of VAWA, to pass constitutional scrutiny.

B. Aftermath of *Lopez*

Prior to the decision, a noted Washington attorney claimed that, if the Government loses, *Lopez* will be "perhaps the most significant constitutional law decision of the last decade."¹¹⁷ The decision predictably has prompted a flood of federal appeals on Commerce Clause grounds and considerable discussion regarding the potential effects the decision will have on federalism and on federal criminal law.

Nonetheless, constitutional scholars are divided over whether *Lopez* will have a long-term effect on Commerce Clause jurisprudence, with some arguing that *Lopez* will result in few changes and others anticipating that the decision will spark a return to federalism.¹¹⁸ Noticing that oral arguments in the case were held on November 8, 1994, the same day Republicans won control of the Congress, other observers claim the decision reflects approval of Congress' vow to reduce the federal government.¹¹⁹ One scholar claims that, at the very

¹¹⁴Solicitor General S. Days argued the Government's case before the Court. He maintained the law passes muster under the Commerce Clause because crime raises insurance costs which are passed on throughout the nation, because guns in schools reduce educational achievement which ultimately results in a reduction in our nation's productivity and ability to compete worldwide. Harvey Berkman, *Supreme Court Heading For The Home Stretch: Commerce Clause Reaches Limit In Gun Zone Ruling*, NAT'L L. J., May 8, 1995, at A14.

¹¹⁵115 S. Ct. at 1632

¹¹⁶Mcjohn, *supra* note 110, at 30. Mcjohn claims that *Lopez* implicitly extends the approach of *New York v. United States*, 505 U.S. 144, 157 (1992), which holds that in determining the extent of commerce power, the court must consider the extend of powers reserved to the states.

¹¹⁷Harvey Berkman, *Congress' Reach May Be Nipped: Scope of Commerce Clause Is At Issue In Gun-Free School Zone Law*, NAT'L L. J., Nov. 21, 1994, at A6 (quoting Richard K. Willard, head of the litigation department at the Washington D.C. law firm Steptoe & Johnson).

¹¹⁸Compare Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643 (1996) with Stephen M. Mcjohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1 (1995).

¹¹⁹See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996).

least, Lopez will result in substantial litigation costs in an effort to figure out "what Lopez means."¹²⁰

Despite this inconclusive debate, federal lawmakers have taken notice of the decision and are looking more closely at ties between legislation and interstate commerce. In addition to the quick legislative attempt to correct the Gun-Free School Zone Act,¹²¹ Lawmakers have mentioned the decision in 1995 debate over the balanced budget¹²² and federal tort reform.¹²³

Prior to *Lopez*, the courts' approach to Commerce Clause jurisprudence was considered "carte blanche for federal intrusion of the traditional jurisdictional realm of the states."¹²⁴ The Commerce Clause gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹²⁵ For about a hundred years after the Court first defined the nature of the clause in 1824,¹²⁶ its decisions used the Commerce Clause to strike down state legislation that "discriminated against interstate commerce."¹²⁷

Though the Court first read the Clause narrowly, this interpretation changed after the New Deal. The Court names *NLRB v. Jones & Laughlin Steel*,¹²⁸ *Wickard v. Filburn*,¹²⁹ and *United States v. Darby*¹³⁰ as ushering in "an era of Commerce

¹²⁰Judge Louis H. Pollak, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533, 551 (December 1995).

¹²¹See *infra* p.25.

¹²²"In *United States versus Lopez*, the Court reaffirmed the belief that the powers of the Federal Government have proscribed limits. Now, it is the opportunity of this Congress to recreate the dual sovereignty that the Framers envisioned. For in the tension between Federal and State power lies the promise of liberty." 141 CONG. REC. S6135-36 (daily ed. May 4, 1995)(statement of Sen. Ashcroft).

¹²³141 CONG. REC. S6033 (daily ed. May 3, 1995).

¹²⁴Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1171 (1995) (quoting George Danzig Levine, *The Proposed New Federal Criminal Code: A Constitutional and Jurisdictional Analysis*, 39 BROOK. L. REV. 1, 64 (1972)).

¹²⁵U.S. CONST. art. I, §8, cl. 3.

¹²⁶*Gibbons v. Ogden*, 9 Wheat 1, 189, 190 (1824). Commerce power is: "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196.

¹²⁷*Lopez*, 115 S. Ct. at 1627. See, e.g., *Kidd v. Pearson*, 128 U.S. 1 (1888) (upholding state ban on manufacture of intoxicating liquor).

¹²⁸301 U.S. 1 (1937) (upholding the National Labor Relations Act upon a Commerce Clause challenge).

¹²⁹317 U.S. 111 (1942) (upholding application of Agricultural Adjustment Act of 1938 to production of homegrown wheat).

¹³⁰312 U.S. 100 (1941) (upholding the Fair Labor Standards Act).

Clause jurisprudence that greatly expended the previously defined authority of Congress under that Clause.¹³¹ Observers describe modern Commerce Clause interpretation as permission for Congress to regulate activities that occur "entirely intrastate" but which "in the aggregate" could affect the national economy.¹³²

Under the previously broad interpretation of commerce power, matrimonial law could "easily be encompassed under federal law, since most marriages use products, or at least, affect interstate commerce."¹³³ In fact, one jurist has mockingly speculated that, under the old interpretation of Commerce Clause power, the O.J. Simpson case could have easily been transferred to federal court since the knife used to commit the crime could be loosely tied to interstate commerce or if the celebrated Bronco chase¹³⁴ crossed state lines.¹³⁵

C. Judicial Response to Lopez

No additional statutes yet have been invalidated and few cases have been overturned on post-*Lopez* Commerce Clause grounds, despite dozens of initial appeals. Most of these appeals involve weapons¹³⁶ and drug¹³⁷ convictions, although other areas of federal criminal law are also being challenged.¹³⁸ The overwhelming number of criminal convictions appealed after *Lopez* have been

¹³¹115 S. Ct. at 1628.

¹³²Harvey Berkman, *Congress' Reach May Be Nipped: Scope of Commerce Clause Is At Issue In Gun-Free School Zone Law*, NAT'L L. J., Nov. 21, 1994, at A6.

¹³³The Honorable Robert E. Cowan, *Federalization of State Law Questions: Upheaval Ahead*, 47 RUTGERS L. REV. 1371, 1384 (1995).

¹³⁴After initially agreeing to turn himself in to authorities after being charged in the double murder, Simpson allegedly fled with longtime friend A.C. Cowlings in a dramatic chase along Southern California freeways that eventually ended with his arrest at his Brentwood estate. Jim Newton & Shawn Hubler, *Simpson Flees Murder Charges; He Disappears After Agreeing to Surrender Crime: Authorities Charge the Former Football Star in the Slayings of his Ex-wife and her Friend*, L.A. TIMES, June 18, 1994, at A1.

¹³⁵*Id.*

¹³⁶*See* U.S. v. Sorrentino, 72 F.3d 294 (1995) (affirmed conviction under 18 U.S.C. § 922(g) - possession of a firearm by a felon); United States v. Diaz-Martinez, 71 F.3d 946 (1995) (affirmed conviction under 18 U.S.C. § 922 (k)); United States v. Bell, 70 F.2d 495 (7th Cir. 1995) (affirmed conviction under 18 U.S.C. § 922(g) (possession of a firearm by a felon)); United States v. Kirk, 70 F.3d 791 (5th Cir. 1995) (affirmed conviction under 18 U.S.C. § 922(o) (possession of machine gun)).

¹³⁷*See* United States v. Baucum, 66 F.3d 362 (D.C. Cir. 1995) (affirmed conviction under 21 U.S.C. § 860(a) - selling cocaine within 1,000 yards of a school, the so-called "schoolyard statute"); United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995) (affirmed conviction under 21 U.S.C. § 841(a) (aiding and abetting the manufacture of marijuana)).

¹³⁸*See* Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) (conviction under 18 U.S.C. § 248 - Freedom of Access to Clinics Act); United States v. Stillo, 57 F.3d 553 (7th Cir. 1995) (conviction under 18 U.S.C. § 1951 (a) - conspiracy to commit extortion).

affirmed. Courts have, however, issued some notable decisions in which *Lopez* has been used to overturn decisions on Commerce Clause grounds.

In *United States v. Pappadopoulos*,¹³⁹ the Ninth Circuit overturned a conviction under the federal arson statute,¹⁴⁰ finding that the fact that the residence in question received natural gas from an out-of-state source was an insufficient tie to interstate commerce.¹⁴¹ The Government also failed the traditional realm of the states portion of the *Lopez* test. The court concluded that "[t]his is a simple state arson crime. It should have been tried in state court."¹⁴² Some feel, however, that the *Pappadopoulos* court misinterpreted the *Lopez* decision and predict that the decision will be overturned upon appeal to the Supreme Court.¹⁴³ Still, in late 1995, the Eleventh Circuit also reversed a conviction under 18 U.S.C. § 844 (i), finding that the arson in question did not have a substantial effect on interstate commerce.¹⁴⁴

A divided Third Circuit decision offers additional evidence that *Lopez* will continue to send shockwaves throughout our legal system. In *United States v. Bishop*,¹⁴⁵ the defendant challenged his conviction under 18 U.S.C. § 2119, the federal carjacking statute,¹⁴⁶ arguing, per *Lopez*, that Congress exceeded its constitutional authority in enacting the law. Although the conviction was affirmed, a strong dissent argued that, under *Lopez*, the statute cannot withstand constitutional challenge.¹⁴⁷ Dissenting Justice Becker stated that "I view *Lopez* as a beacon that we must follow, and the direction in which the beacon points compels my vote to invalidate the carjacking statute as beyond the broad reach of Congress's Commerce Clause power."¹⁴⁸ Justice Becker boldly concluded that he believed that non-commercial intrastate crimes, even ones receiving publicity in the national media, are a matter of state and not

¹³⁹64 F.3d 522 (9th Cir. 1995).

¹⁴⁰18 U.S.C. § 844(i) (1988).

¹⁴¹64 F.3d at 527.

¹⁴²*Id.* at 528.

¹⁴³Jesse H. Choper, Remarks at Symposium on The New Federalism After *United States v. Lopez* (Nov. 10, 1995) (videotape on file at the Case Western Reserve Law School library).

¹⁴⁴*United States v. Denalli*, 73 F.3d 328 (1996).

¹⁴⁵66 F.3d 569 (1995).

¹⁴⁶18 U.S.C. § 2119 provides that: "Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall be fined under this title or imprisoned."

¹⁴⁷*Bishop*, 66 F.3d at 590 (Becker, J., dissenting).

¹⁴⁸*Id.* at 591.

federal concern."¹⁴⁹ Court observers, however, point to recent denials of certiorari in post-*Lopez* cases as proof that the Supreme Court may not be interested in further strengthening its limits on Congress' Commerce Clause power.¹⁵⁰ The Court apparently is willing to let stand a Fourth Circuit conviction under the federal arson statute in which the court concluded that receipt of electricity from interstate power grid is a sufficient tie to interstate commerce.¹⁵¹ Interestingly, Justice Scalia said he would grant the petition and "remand the case to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *United States v. Lopez*."¹⁵²

IV. APPLICATION: THE CONSTITUTIONALITY OF THE VAWA

Sections 2261, the interstate travel provision, and 13981, the civil rights provision, of the VAWA would most likely fail the new *Lopez* test for determining if the measure falls within Congress' power under the Commerce Clause. Neither provision substantially affects interstate commerce and, more importantly, both involve an area of concern traditionally left to the states: domestic relations.

A. Congress' Understanding of the Scope of the Commerce Clause

Perhaps the strongest argument for overturning portions of the VAWA is the legislative reliance on the outdated interpretation of Congress' Commerce Clause power. In fact the civil rights provision [hereinafter *title III* or § 13981] is expressly premised upon Congress' Commerce Clause power. Significantly, Justice Breyer's *Lopez* dissent voices concern over the effect the decision could have on the 100 federal statutes, including at least 25 criminal provisions, that use the term "affecting commerce" in defining their scope.¹⁵³

Lawmakers studying the civil rights remedy provided, in a Senate Report,¹⁵⁴ an in-depth analysis of the provision "because many questions have been raised regarding title III."¹⁵⁵ In hearings before the Senate Judiciary Committee,

¹⁴⁹*Id.* at 603

¹⁵⁰Kathleen Brickley, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801 (1996).

¹⁵¹*United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995). The defendants were convicted of committing arson under 18 U.S.C. § 844 after setting fire to the trailer of an interracial couple.

¹⁵²*See* 115 S. Ct. 1838 (1995).

¹⁵³115 S. Ct. at 1164 (Breyer, J., dissenting). Breyer concludes, "[h]owever these questions are eventually resolved, the legal uncertainty now created will restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather than instance by instance, seriously threatens the economic, as well as social, well-being of Americans." *Id.* at 1165.

¹⁵⁴S. Rep. No. 103-138 at 48.

¹⁵⁵*Id.*

scholars concluded, because title III is based on the Commerce Clause, "the constitutional objections to the bill are quite weak."¹⁵⁶ The Senate Report further states that federal lawmakers need only have a "rational basis" for creating a law because the "Commerce Clause is a broad grant of power allowing Congress to reach conduct that has even the slightest effect on interstate commerce."¹⁵⁷ Congress can pass a law even if it "does not directly effect 'commerce'" and may even reach conduct "that may seem purely local in nature."¹⁵⁸

In meeting this "modest threshold," the Report offers general evidence tying the provision to interstate commerce. It claims gender-based crime "restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending."¹⁵⁹ In coming to these conclusions, lawmakers offered studies on women and rape¹⁶⁰ and reports on how gender-based violence affects women in the workforce,¹⁶¹ but no strong figures or other evidence tying gender-based violence to interstate commerce. While this proof allowed the provision to pass constitutional muster under the pre-*Lopez* standard for determining Congress' Commerce Clause authority, it is inadequate under the new *Lopez* standard. It is doubtful whether either VAWA provision in question could meet this new test.

Disagreement exists, however, over whether *Lopez* actually overruled the rational basis test for determining Congress' limits under the Commerce Clause. The *Doe* court, in denying defendant's motion to dismiss plaintiff's complaint under the VAWA civil rights provision, concluded that *Lopez* reaffirmed the rationality test of *Hodel v. Virginia Surface Mining & Reclamation*

¹⁵⁶See *Women and Violence: Hearings before the Senate Judiciary Committee*, 102d Cong., 1st Sess. (Apr. 9, 1991). Professors Cass Sunstein of the University of Chicago School of Law and Burt Neuborne of the New York University School of Law testified that Congress has the power under the Commerce Clause to enact such a civil rights remedy for victims of gender-motivated crime. Interestingly, Professor Neuborne, in an article discussing the 1994 Supreme Court term, claims, "[a]n early indicator of the impact of *Lopez* may come in cases challenging the constitutionality of the Violence Against Women Act, which was premised in part on Congress' Commerce Clause power." Burt Neuborne, *Significant Constitutional Opinions: 1994 Term* in COMMUNICATIONS LAW: 1995, (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 989, (1995)).

¹⁵⁷S. Rep. No. 103-138 at 54.

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰See E. Ellis, B. Atkeson, and K. Calhoun, *An Assessment of Long-Term Reaction to Rape*, 90 J. ABNORMAL PSYCHOLOGY NO. 3, 264 (1981) (concluding that 50 percent of rape victims lose or quit their jobs following the crime).

¹⁶¹See 39 MORBIDITY & MORTALITY WKLY., 544 (1990)(claiming that fear of attack deters women from taking certain jobs or positions that would require them to work certain hours).

*Ass'n Inc.*¹⁶² The *Doe* court acknowledged that *Lopez* "does warn that the Commerce Clause has limits, and that 'the scope of the interstate commerce power, must be considered in light of our dual system of government and may not be extended as to embrace effects upon interstate commerce so indirect and remote.'"¹⁶³ The *Doe* court, however, maintained that the rational basis test remains the proper measure of Congress' Commerce Clause power. The court decided that, "[a] rational basis exists for concluding that gender-based violence, which the VAWA's Civil Rights Remedy regulates, is a national problem with substantial impact on interstate commerce."¹⁶⁴ This Note maintains that the new "substantial effects" test set forth in *Lopez* replaced the rational basis test for determining Congress' Commerce Clause power and, unlike *Doe*, contends that, in most cases, domestic violence does not have the requisite tie to interstate commerce necessary to justify federal intervention.

B. No Substantial Effect on Interstate Commerce

Using the analysis of the *Lopez* court, both VAWA provisions would have to be studied under the "substantially effects" test, since neither involve channels nor instrumentalities of interstate commerce, the other methods, according to the Court, by which Congress can regulate activity. While it could be argued that all persons could be considered "instrumentalities" of interstate commerce, accepting this argument would open all activity to federal control with little analysis.

Like the Government in *Lopez*, proponents of VAWA would likely fail the "substantial effects" test if presented with a Commerce Clause challenge. The Court in *Lopez* rejected both the "cost of crime" and "national productivity" arguments offered by the Government to show that guns near schools affect interstate commerce. The Government claimed that the possession of firearms in school zones could increase the costs of violent crime which, through insurance, are spread throughout the population.¹⁶⁵ The Government further argued that the presence of guns in schools has an adverse affect on the educational process, which could lead to a "less productive citizenry."¹⁶⁶

Lawmakers have set forth similar arguments to justify congressional intrusion into the area of domestic relations through the VAWA's civil rights remedy.¹⁶⁷ Had Congress felt the need to show how VAWA's criminal provision

¹⁶²452 U.S. 264 (1981). *Hodel* maintains that, in reviewing the constitutionality of a statute under the Commerce Clause, a court is limited to "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Doe*, 929 F. Supp. at 612.

¹⁶³*Doe*, 929 F. Supp. at 613 (quoting *Lopez*, 115 S. Ct. at 1628).

¹⁶⁴*Id.* at 610.

¹⁶⁵115 S. Ct. at 1632.

¹⁶⁶*Id.*

¹⁶⁷See *infra* pp. 18-19.

was tied to interstate commerce, it would have used reasoning similar to the "cost of crime" and "national productivity" arguments used by the Government in *Lopez*. Since 18 U.S.C. § 922(q) was struck down using analogous arguments, the Court most likely would not accept this same reasoning in a VAWA challenge.

The Court in *Lopez* suggested that more formal legislative findings could have provided a link between gun possession in school zones and interstate commerce.¹⁶⁸ Under the rational basis test previously used in Commerce Clause analysis, however, Congress is not required to "articulate its reasons for enacting a statute."¹⁶⁹ Although the Court in *Lopez* acknowledged this fact, the Court observed that, where the relationship between the activity and interstate commerce is not obvious, legislative findings may assist in evaluating the congressional judgment that a substantial relationship exists.¹⁷⁰ The Government in *Lopez* argued that Congress had included specific findings in firearms legislation on prior occasions, but the Court concluded that reliance on previous findings would be inappropriate in the context of the Gun-Free School Zones Act because "neither the findings nor the laws they support address gun possession in school zones or the relationship between that activity and commerce."¹⁷¹

Comparatively, the VAWA would have passed the pre-*Lopez* rational basis test but would fail the new "substantial effects" analysis requiring legislative findings linking an activity to interstate commerce. Though the Act's legislative history, as discussed, provides evidence indicating a tenuous tie between domestic violence and interstate commerce, the Act itself admits that the true effects of domestic violence on the national economy may be unknown.¹⁷² A minor provision of the VAWA requires a study by the Secretary of Health and Human Services, among other things, to project the cost to health care facilities from incidents of domestic abuse.¹⁷³ Since lawmakers enacting the VAWA concede, by the inclusion of this provision, that the economic effects of

¹⁶⁸Brickey, *supra* note 150, at 822.

¹⁶⁹FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993).

¹⁷⁰115 S. Ct. 1624 at 1632.

¹⁷¹Brickey, *supra* note 150, at 825.

¹⁷²See *supra* pp. 22-23.

¹⁷³See 42 U.S.C.A. § 13963 (West 1995) (previously Pub. L. No. 103-322, § 40293 (1994)), titled Number and Cost of Injuries:

(a) STUDY.—The Secretary of Health and Human Services, acting through the Centers for Disease Control Injury Division, shall conduct a study to obtain a national projection of the incidence of injuries resulting from domestic violence, the cost of injuries to health care facilities, and recommend health care strategies for reducing the incidence and costs of such injuries.

(b) AUTHORIZATION OF APPROPRIATIONS.— There are authorized to be appropriate to carry out this section —\$100,000 for fiscal year 1996.

domestic violence are, for the most part, unknown, it is unlikely that additional legislative history could be offered that would provide a link between domestic violence and interstate commerce strong enough to withstand a *Lopez* challenge.

After studying the legislative history of the VAWA civil rights provision, the *Brzonkala* court determined that the statute fails the *Lopez* substantial effects test. In comparing the VAWA civil rights remedy with the statute at issue in *Lopez*, the court concluded that "[t]he bottom line is that both *Lopez* and the case at hand involve regulated activity that is too remote from interstate commerce. Any substantial distinction between the lengths of the chains of causation in *Lopez* and the lengths of the chains in the case at hand is inconsequential."¹⁷⁴

The *Doe* court, however, found that the Act's legislative history does provide an adequate link between domestic violence and interstate commerce. The defense maintained, as does this Note, that *Lopez* is critical of the same "cost of crime" and "national productivity" arguments relied upon in enacting the VAWA.¹⁷⁵ The *Doe* court rejected this argument as "based upon 'selectively relying on Supreme Court statements plucked from their context.'"¹⁷⁶ *Doe* further argues that "[t]he Congressional findings and reports qualitatively and quantitatively demonstrate the substantial effect on interstate commerce of gender-based violence, in marked distinction to the Gun-Free Zone Act challenged in *Lopez* which lacked such analysis, only theoretical impact arguments."¹⁷⁷

Furthermore, similar to the Gun-Free School Zone Act, the VAWA is not an "essential part of a larger regulation of economic activity" that could tie the law to interstate commerce if considered with a larger regulatory scheme. The Court in *Lopez* states that the gun law could be considered constitutional if associated with an aggregate of activities "that arise out of or are connected with a commercial transaction, which views in the aggregate, substantially affects interstate commerce."¹⁷⁸ The VAWA likewise has no ties to such commercial activities. The VAWA is part of a larger regulatory scheme: the 1994 Crime Bill. The only arguments, however, that could tie the entire Bill to commercial activity would be those resoundingly rejected by the *Lopez* court.

The *Lopez* decision creates additional confusion by failing to clarify the terms "commerce" and "economic enterprise." The Court concluded that the Gun-Free School Zones Act has "nothing to do with 'commerce' or any sort of economic

¹⁷⁴*Brzonkala*, 979 F. Supp. at 791.

¹⁷⁵*Doe*, 929 F. Supp. at 613.

¹⁷⁶*Id.* (quoting *U.S. v. Wilson*, 73 F.3d 675, 685 (11th Cir. 1995)).

¹⁷⁷*Id.*

¹⁷⁸115 S. Ct. at 1631.

enterprises, however broadly one might define those terms."¹⁷⁹ The Court, however, offers no definition of commercial or economic activity, but concedes that no precise formula exists for determining what is commercial or noncommercial.¹⁸⁰ Notably, this lack of definition allowed the *Doe* court to find that gender-based violence has a substantial effect on commerce. The court points out that "Supreme Court precedent does not articulate a particular standard or test to determine whether a particular activity 'substantially affects' interstate commerce."¹⁸¹ The *Doe* court, thus, took advantage of the *Lopez* conclusion that "whether a particular activity substantially affects commerce is 'ultimately a judicial rather than a legislative question.'"¹⁸²

C. No Jurisdictional Element

A jurisdictional requirement in a federal statute requires a tie to interstate commerce on a case-by-case basis. Scholars suggest that crossing a state line, as required by the VAWA's criminal provision, 18 U.S.C. § 2261, automatically invokes Congress' Commerce Clause power.¹⁸³ Thus, in the VAWA's criminal provision, the jurisdictional element is always invoked by requiring that a perpetrator cross state lines when committing an act of domestic violence. Other statutes require a prosecutor to prove that the individual case is linked to interstate commerce.¹⁸⁴

A notable similarity between the VAWA civil rights provision and the statute at issue in *Lopez* is the absence of a jurisdictional element. The inclusion of such an element would require prosecutors to evaluate the ties to interstate commerce in individual cases. The inclusion of a jurisdictional element in the federal arson statute, 18 U.S.C.A. § 844(i), explains why an arson conviction was overturned in *Pappadopoulos* but affirmed by the Sixth Circuit in *United States v. Sherlin*.¹⁸⁵ The *Sherlin* court determined that the college dormitory involved in the crime provided an adequate tie to interstate commerce,¹⁸⁶ while the *Pappadopoulos* court found an insufficient tie to commerce. If a jurisdictional

¹⁷⁹115 S. Ct. at 1630-31.

¹⁸⁰115 S. Ct. at 1163-64.

¹⁸¹*Doe*, 929 F. Supp. at 614.

¹⁸²*Id.* (quoting *United States v. Lopez*, 115 S. Ct. at 1629).

¹⁸³Brickey, *supra* note 150, at 812.

¹⁸⁴*See, e.g.*, 18 U.S.C.A. § 844(i) (West 1995), the federal arson statute: Whoever maliciously damages or destroys, or attempts to damage or destroys, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than \$10,000 or both.

Id. (emphasis added).

¹⁸⁵67 F.3d 1208 (6th Cir. 1995).

¹⁸⁶*Id.*

element were present in *Lopez*, the case could have been overturned without invalidation of the statute.

The addition of a jurisdictional element could, perhaps, allow some VAWA civil rights cases to pass the substantial effects test without invalidating that portion of the Act. For example, attorneys in *Brzonkala* could have, using the logic of *Sherlin*, argued that, because the alleged rape took place on a college campus, there was a proper tie to interstate commerce. In fact, a Justice Department attorney arguing for the plaintiffs before the federal judge in Roanoke on the motion to dismiss the case pointed out that the number one reason college freshman drop out of school is because they were raped.¹⁸⁷

While the *Brzonkala* court did not discuss whether the individual case involved an adequate tie to interstate commerce, it did note the lack of a jurisdictional element. Although the court determined that "it is unclear whether such a jurisdictional requirement is needed,"¹⁸⁸ it concluded that "ambiguity in criminal statutes should be resolved in favor of lenity . . . and that ambiguity should be resolved in favor of not significantly changing the federal-state balance."¹⁸⁹

The crossing of state lines required to invoke the VAWA criminal provision was, in the past, enough to invoke federal jurisdiction. Congress traditionally used this interstate transportation method to impose federal jurisdiction over many areas ordinarily considered local, such as kidnapping,¹⁹⁰ prostitution,¹⁹¹ and child pornography.¹⁹² Until *Lopez*, the Court repeatedly validated this approach.¹⁹³ Nonetheless, *Lopez* could inflict doubt on this method. A crime that involves the crossing of state lines may not have a substantial effect on interstate commerce. Similar to Alphonso Lopez, Christopher Bailey is a local actor. Crossing a state line when committing domestic abuse did not magically transform his crime from a noncommercial to a commercial activity or from a noneconomic to an economic activity. The *Lopez* logic demands that this well-established method of invoking federal jurisdiction be reconsidered as courts re-examine Commerce Clause jurisprudence.

¹⁸⁷Jan Vertefeuille, *Big Guns Square Off in Lawsuit; D.C. Firm, Justice Dept. Hold Forth on Brzonkala*, ROANOKE TIMES & WORLD NEWS, June 11, 1996, at C1.

¹⁸⁸*Brzonkala*, 779 F. Supp. at 792.

¹⁸⁹*Id.* (citing *United States v. Bass*, 404 U.S. 336, 347, 349 (1971)).

¹⁹⁰18 U.S.C.A. § 1201 (West 1995) (transporting kidnapping victim over state lines).

¹⁹¹18 U.S.C.A. § 2421-2423 (West 1995) (transporting an individual over state lines to engage in prostitution).

¹⁹²18 U.S.C.A. § 2251 (West 1995) (transporting a minor across state line to engage in sexually explicit conduct for visual depiction).

¹⁹³*See, e.g., Hipolite Egg Co. v. United States*, 227 U.S. 309 (1913) (upholding federal statute prohibiting interstate transportation of adulterated articles); *Reid v. Colorado*, 187 U.S. 137 (1902) (upholding federal statute prohibiting the interstate transport of diseased livestock).

In discussing the federal carjacking statute, which also lacks a jurisdictional element, the *Bishop* majority admits that, "[t]he mere presence of a jurisdictional element does not in and of itself insulate a statute from judicial scrutiny under the Commerce Clause, or render it per se constitutional. Conversely, the courts must inquire further to determine whether the jurisdictional element has the requisite nexus with interstate commerce."¹⁹⁴ The courts could therefore find cases under 18 U.S.C. § 2261 unconstitutional despite the presence of a jurisdictional element. Scholars have already labeled 18 U.S.C. § 2261's jurisdictional element "marginally relevant" in urging Congress to avoid bringing "matters of primarily local interest into the local sphere" by this type of statutory construction.¹⁹⁵

Since the *Lopez* decision arguably is merely the result of inadequate statutory construction, lawmakers accordingly felt that changing statutory language by adding a jurisdictional element would fix the Gun-Free School Zones Act of 1990 and conveniently allow the measure to fall under Congress' Commerce Clause powers. Approximately two weeks after *Lopez* was decided, United States President William Clinton sent identical letters to both houses of Congress urging the passage of the Gun-Free School Zones Amendments Act of 1995.¹⁹⁶ The sole change in the measure, recommended after the President asked Attorney General Janet Reno to formulate a "legislative solution" to the problems identified in the *Lopez* decision, is the inclusion of the jurisdictional element which the President optimistically claims will bring the legislation "within the Congress' Commerce Clause authority."¹⁹⁷ The amended Act requires the Government to show that the firearm has 'moved in or the possession of such firearm otherwise affects interstate or foreign commerce.'¹⁹⁸

The Gun-Free School Zones Act of 1995 (S. 890) was introduced to Congress less than a month after President Clinton issued his letter.¹⁹⁹ Introducing the amended bill, Wisconsin Senator Herbert Kohl stated, "there is no doubt that the guns brought to schools are part of an interstate problem. After all, almost every gun is made with raw material from one State, assembled in a second State and transported to the school yard of another State."²⁰⁰ Kohl's argument, however, is precisely that which the *Lopez* court firmly rejected. Utilizing the

¹⁹⁴*Bishop*, 667 F.3d at 585.

¹⁹⁵*Brickey*, *supra* note 124, at 1168.

¹⁹⁶141 CONG. REC. H4680-03, S6459-02 (daily ed. May 10, 1995). The President's letter states that he is "committed to doing everything in my power to make schools places where young people can be secure, where they can learn, and where parents can be confident that discipline is enforced." *Id.*

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹141 CONG. REC. S7918-02 (daily ed. June 7, 1995).

²⁰⁰*Id.*

Senator's logic, almost any activity could be related to interstate commerce. Kohl continued his speech by saying that forty states currently regulate guns on school grounds, offering proof that the amended law is still questionable under the portion of the *Lopez* analysis that asks if the regulated activity is one which is traditionally relegated to the States.²⁰¹ Likewise, the fact that 18 U.S.C. § 2261 includes a jurisdictional component tying the crimes to interstate activity will not change the fact that the acts of domestic violence likely to be charged under the law have no substantial tie to interstate commerce.

D. States' Role

Convincing a court that domestic violence is not an area of law traditionally overseen by the States may be a tougher hurdle for the VAWA to overcome. Domestic violence arguably combines two areas of the law mentioned by the Court in *Lopez* as traditionally under state control: crime and domestic relations. A strong argument for the invalidation of both the VAWA's interstate criminal provision and the civil rights remedy under *Lopez* grounds is thus that the statutes, like the education tie to 18 U.S.C. § 922(q), concern an area of law traditionally left to the states.

The *Lopez* decision confirms that "it is well established that education is a traditional concern of the states."²⁰² Importantly, the decision also concedes that domestic relations falls into this category.²⁰³ The dissenting *Lopez* justices also acknowledge the domestic relations exception to federal jurisdiction. While these justices disapproved of invalidating 18 U.S.C. § 922 (q), their decision indicated that they would, perhaps, favor repealing 18 U.S.C. § 2261 based on their recognition of the domestic relations exception to diversity jurisdiction. Justice Breyer's dissent in *Lopez* acknowledges that there could be limits on Congress' Commerce Clause power in family law.

To hold this statute constitutional is not to "obliterate" the "distinction of what is national and what is local," nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education.²⁰⁴

This singling out of family law indicates that Breyer realizes the importance of maintaining the family law exception to diversity jurisdiction.

²⁰¹*Id.* Kohl's speech continued by acknowledging that some of his colleagues have asked why a federal statute is necessary. Kohl says, "The answer is simple. Some States still do not have State Gun-Free School Zones Acts; others simply have laws that supplement the Federal statute; still more have laws that are weaker than the Federal law." *Id.*

²⁰²115 S. Ct. at 1640. (Kennedy, J., concurring).

²⁰³*Id.* at 1632.

²⁰⁴*Lopez*, 115 S.Ct. at 1661 (Breyer, J., dissenting).

The increasing intrusion of the federal courts into the area of domestic relations is well documented. One observer claims that "prior to the current Supreme Court term, one might easily have concluded that we were witnessing the inevitable surrender of perhaps the last remaining substantive legal area within the states' exclusive control."²⁰⁵

For decades, cases involving domestic relations were rarely heard in federal courthouses. The so-called "domestic relations exception" to diversity jurisdiction has been recognized by scholars as a court-made doctrine.²⁰⁶ The exception has been traced to the 1859 case of *Barber v. Barber*,²⁰⁷ in which the Court announced without justification, "[o]ur first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony."²⁰⁸ The *Barber* dissent further argued that a government should not enter "the chambers and nurseries of private families."²⁰⁹ Commentators have observed that the dissenters by "[g]overnment," meant the federal, not state governments, and noticed that the dissenting judges felt that the "'particular communities of which those families form parts' could regulate families."²¹⁰ About thirty years later the Supreme Court reiterated this intent in *In Re Burrus*,²¹¹ declaring "[t]he whole subject to the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."²¹²

Since *Barber*, the federal courts have found exceptions to the domestic relations exception, particularly in the area of tort and contract law.²¹³ In 1988,

²⁰⁵Dailey, *supra* note 12, at 1789.

²⁰⁶See ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 5.3 (1989). Chemerinsky mentions domestic relations and probate as exceptions to diversity jurisdiction. He recognizes the opinions of critics who claim that if such exceptions are desired, it is more appropriate for Congress to create them. He also suggests that it may be inappropriate to exempt domestic relations and probate from "federal court review because they are no more linked to core aspects of state sovereignty than are many other types of suits that federal courts may adjudicate." *Id.* at 289.

²⁰⁷62 U.S. (21 How.) 582 (1859).

²⁰⁸*Id.* at 584.

²⁰⁹*Id.* at 602 (Daniel, J., dissenting).

²¹⁰*Id.* See Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1077 n.17 (1994).

²¹¹136 U.S. 586 (1890).

²¹²*Id.* at 593-94.

²¹³See *Rafferty v. Scott*, 756 F.2d 335 (4th Cir. 1985)(holding that, in case in which former husband sought damages for intentional infliction of emotional distress by wife after wife allegedly attempted to destroy father-son relationship, diversity jurisdiction over such an action did not contravene domestic relations exception to federal diversity jurisdiction); *Turpin v. Turpin*, 415 F. Supp. 12 (W.D. Okla. 1975)(holding that where the complaint involved both an "alleged contractual wrong and alleged tortious wrong, neither of which appeared to arise out of the parties' former marital relationship, the

the Court reaffirmed the exception in *Thompson v. Thompson*²¹⁴ and invalidated the Parental Kidnapping Act. In 1992, the Supreme Court again upheld the exception, but narrowed its scope considerably. In *Ankenbrandt v. Richards*,²¹⁵ a unanimous Court concluded that the exception encompasses only cases involving the issuance of divorce, alimony or child custody decrees,²¹⁶ but reasoned that the exception is a matter of statutory, as opposed to constitutional, construction.²¹⁷ Writing for the majority, Justice Byron White decided that, "the exception has no place in a suit such as this one, in which a former spouse sues another on behalf of children alleged to have been abused."²¹⁸

Legal observers immediately speculated that the decision could ease the way for Congress to pass the then-pending VAWA.²¹⁹ Proponents of the Act could easily argue that by excluding domestic violence from the areas specifically mentioned as remaining with the domestic relations exception, the Court leaves open the possibility of federal jurisdiction over domestic violence. A VAWA challenge could spark a judicial debate over the difference between domestic relations and domestic violence and whether classifying domestic abuse as a separate area of criminal activity is beneficial or detrimental to its control. Lawmakers considering passage of the VAWA found that labeling abuse against women "domestic violence," lessened its severity and furthered its perception as a "family" problem or "private matter." A Senate report concludes that, "[a]nd until we name all violence against women as crime, it will be seen neither as violence nor as crime."²²⁰

Even if the Court finds that domestic violence differs from domestic relations, the *Lopez* decision recognizes that crime is an area of law traditionally reserved to the states. 18 U.S.C. § 2261 governs criminal activity. Justice Rehnquist's opinion recognizes crime as an area of traditional state concern saying, "[u]nder the theories that the Government presents in support of 18

action was not primarily a marital dispute and the federal court had subject matter jurisdiction").

²¹⁴484 U.S. 174 (1988).

²¹⁵504 U.S. 689 (1992). The case involves a Missouri mother who sued her former husband and a companion in federal court in Louisiana for damages resulted from alleged sexual abuse of her daughters.

²¹⁶504 U.S. at 704.

²¹⁷504 U.S. at 695 (finding that Article III, § 2 of the Constitution does not exclude domestic relations cases from "the jurisdiction otherwise granted by statute to the federal courts.")

²¹⁸*Id.* at 706.

²¹⁹Professor Linda Mullenix of the University of Texas School of Law called the decision an "'open invitation' to Congress to create by statute a basis for federal jurisdiction in domestic relations disputes." See Marcia Coyle & Marianne Lavelle, *Court Affirms Family Exception, Narrowly*, NAT'L L.J., June 29, 1992, at 5.

²²⁰S. Rep. No. 102-197, at 37 (1991).

U.S.C. § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States have historically been sovereign."²²¹ Justice Kennedy furthers that, when dealing with crime, the States should be allowed to "perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."²²²

The states as "laboratories for experimentation" is a better environment than the federal courts for discovering solutions to the problem of domestic violence. Similar to education, issues surrounding domestic violence vary from state to state. The states have continuously been developing various ways to deal with the problem of domestic violence based on their respective experiences with the problem. This experimentation should not be halted by federal intrusion. Justice Kennedy's *Lopez* concurrence points out that more than forty states already have criminal laws outlawing the possession of firearms on or near school grounds.²²³ Likewise, the states have already developed a long history of enacting laws in response to domestic violence. At least twenty-seven states mandate arrest on domestic violence cases in which there is clear evidence of a crime.²²⁴ Over the past three years, at least forty-one states have passed stalking laws that allow police to arrest an ex-spouse or partner for threatening or harassing a victim. Previously officers could not do anything unless a victim was physically attacked.²²⁵

In the year following the Simpson and Goldman murders several states made significant changes in domestic violence legislation. California lawmakers say the Simpson case was a primary influence in their reform efforts. As of January 1, 1996, first-time batterers were unable to escape criminal prosecution by agreeing to undergo counseling, a tactic attempted by O.J. Simpson in a 1989 attack on his wife.²²⁶ This bill, signed into law by Governor Pete Wilson in October 1995, eliminates the "diversion" process instituted in 1979, which allowed those accused of domestic abuse to avoid criminal prosecution by agreeing to undergo counseling.²²⁷ Bill sponsor, Rep. Tom Hayden (D-Santa Monica), said the gruesome pictures of Nicole Brown

²²¹115 S. Ct. at 1632.

²²²*Id.* at 1641 (Kennedy, J., concurring).

²²³*Id.*

²²⁴Gest & Streisand, *supra* note 22.

²²⁵Andrea Rock, *Unequal Justice: Women Have Won Many Important Legal Victories, But We Still Have A Long Way To Go*, LADIES HOME JOURNAL, Apr. 1995, at 106.

²²⁶Bill Stall, *Law Stiffened For First-Time Wife Beaters*, L.A. TIMES, Oct. 6, 1995, at 3. Simpson's lawyers asked a judge to allow Simpson to undergo counseling so he could emerge without a criminal record, but the request was denied. Had the request been granted, there would have been no court record of the assault.

²²⁷*Id.*

Simpson, shown at Simpson's double murder trial, were "motivating factors" in passage of the new law.²²⁸

On June 23, 1994, the New York legislature unanimously passed a multifaceted plan²²⁹ to fight domestic violence by requiring the arrest of batterers who commit a felony assault or violate protection orders and by requiring training of police and prosecutors in dealing with domestic violence.²³⁰ Colorado currently has one of the country's toughest set of domestic violence laws, requiring arrest for a first violation of a restraining order and mandatory jail time for subsequent violations.²³¹ As a result, domestic violence arrests in that state have climbed 70 percent in three years.²³² Also in 1995, the Texas legislature eliminated the so-called "spousal privilege" in its domestic violence law, a change observers claim is the result of the publicity surrounding the Simpson case.²³³ In its 1995 legislative session, Oregon authorized restraining orders against stalkers and passed a measure that fines those found guilty of domestic violence \$500 to \$2,000.²³⁴ Many states put tougher laws on the books even before the Simpson case in response to strong local publicity. In 1992, the Kentucky legislature enacted more stringent domestic violence measures in response to a Pulitzer Prize-winning series of editorials by a Kentucky newspaper.²³⁵ Officials claim that the National Council of Juvenile and Family Court Judges now look to Kentucky for assistance in developing a model code.²³⁶

Similar to the VAWA, many of these state laws had been pending for years. State lawmakers claim that the Simpson case "created a climate that compelled lawmakers to approve them."²³⁷ This catalytic effect is obviously true for federal lawmakers who were not only feeling political pressure to pass the VAWA, but the entire 1994 Crime Bill out of a fear of appearing soft on crime.

²²⁸*Id.* See California Senate Bill 169. See also California Assembly Bill 1937, which prohibits insurance companies from denying or restricting coverage from victims of domestic abuse and California Senate Bill 924, which extends from one to three years the period in which abuse victims can file civil suits in those cases.

²²⁹N.Y. EXEC. LAW Article 21, § 575 (West 1996).

²³⁰Rorie Sherman, *Domestic Abuse Bills Gain Momentum in Legislatures; The Violence Against Women Act Has Lingered on the Hill for Four Years*, NAT'L L.J., July 4, 1994, at A9.

²³¹Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994, at 18.

²³²Gest & Streisand, *supra* note 22.

²³³Helen Thorpe, *Fighting Back*, TEXAS MONTHLY, Dec. 1995, at 22. See also OR. REV. STAT. § 163.730 et. seq (1995).

²³⁴Chastity Pratt, *Aid Calls Rise in Wake of Simpson Acquittal*, PORTLAND OREGONIAN, Oct. 16, 1995, at B1.

²³⁵Robert H. Campbell & Valarie Honeycutt, *Enforcement of Strict Spouse Abuse Laws Uneven in California, As in Kentucky*, LEXINGTON HERALD-LEADER, June 21, 1994, at A1.

²³⁶*Id.*

²³⁷Pratt, *supra* note 232, at B1.

This national publicity will likely make these previously ineffective state measures more viable, further lessening the need for federal action. Since the state legislatures, like Congress, have responded to the outrage generated by the Simpson case, these "laboratories for experimentation" are actively pursuing solutions to the domestic violence problems.

The *Doe* court also acknowledged the argument that the VAWA encroaches on states' police power. The court, however, claims that the VAWA civil rights remedy "does nothing to infringe on a state's authority to arrest and prosecute an alleged batterer on applicable criminal charges."²³⁸ The court further concludes that the VAWA actually complements state law by providing a remedy distinct from state tort claims and that "[a] plaintiff who obtains relief in a civil rights lawsuit 'does so not for himself [or herself] alone but also as a private attorney general vindicating a policy that Congress considered of the highest importance.'"²³⁹

Ideally, the portions of the VAWA which provide money to the states²⁴⁰ to continue their efforts should remain, while the criminal and civil rights provisions should be invalidated on Commerce Clause grounds. Judge Robert E. Cowen of the Third Circuit Court of Appeals suggests that, through innovative use of Congress' spending power,²⁴¹ the deterrent goals of the VAWA could be maintained. Judge Cowen proposes that the federal government could require the states to "provide adequate penalties or certain infractions and crimes" by providing funds on the condition that the states impose certain uniform regulations" as is done in traffic and driver licensing.²⁴² This cooperation "achieves the end result of federalization without the pain of having to federalize all traffic regulations and overwhelming the federal courts with traffic violation cases."²⁴³

²³⁸*Doe*, 929 F. Supp. 616.

²³⁹*Id.* (quoting *City of Riverdale v. Rivera*, 477 U.S. 561, 575 (1986)).

²⁴⁰*See, e.g.*, 42 U.S.C.A., § 3796gg (West 1995):

(a) General Program Purpose.—The purpose of this part is to assist States, Indian tribal government, and units of local government to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women.

(b) Purposes For Which Grants May Be Used.—Grants under this part shall provide personnel, training, technical assistance, data collection and other equipment for the more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women.

²⁴¹*See* U.S. CONST. art. I, § 8, cl. 1.

²⁴²The Honorable Robert E. Cowen, *Federalization of State Law Questions: Upheaval Ahead*, 47 RUTGERS L. REV. 1371, 1371 (1995).

²⁴³*Id.*

E. VAWA & Federalism

Justice Kennedy concedes that no reasonable person would argue that students should not carry guns on school property.²⁴⁴ Likewise, no reasonable person will argue that citizens should not be concerned with the problem of domestic violence in our country. Kennedy's interest, however, is that Congress' method of solving this and other problems interferes with the balance of powers between the states and the federal government as set forth in the Tenth Amendment.²⁴⁵ He asserts,

[w]hile the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obligated to enforce.²⁴⁶

Maintaining this balance adds strength to the argument that Congress exceeded its authority in enacting the VAWA as scholars have observed that Federalist theory requires that, "federal courts should exercise only limited jurisdiction, deferring to the strong (and equal) state courts, which traditionally have controlled and developed expertise in family law."²⁴⁷

This change in the balance between the states and federal government appears to be escalating. Congress has created 202 new laws in the last twenty years.²⁴⁸ The 1994 Crime Bill added more than 100 new federal criminal provisions.²⁴⁹ Federalization of criminal law is dramatically increasing the workload of federal courts, so much so that one jurist calls this increase "the most pressing concern for the federal judiciary."²⁵⁰ This "creeping federalism" was considered the "hottest issue" at the 1995 Ninth Circuit Court of Appeals annual judicial conference.²⁵¹ Panelist Representative and vice chairman of the House Judiciary Committee Don Edwards told attendees of judges' displeasure with new laws putting carjacking, collection of child support, as well as

²⁴⁴115 S. Ct. at 1641 (Kennedy, J., concurring).

²⁴⁵"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

²⁴⁶115 S. Ct. at 1642 (Kennedy, J., concurring).

²⁴⁷Naomi Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073, 1073-74 (1994).

²⁴⁸William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719 (1995).

²⁴⁹*Id.* (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796).

²⁵⁰Cowan, *supra* note 242, at 1371.

²⁵¹Victoria Slind-Flor, *9th Circuit's Theme: Federalism*, NAT'L L.J., Aug. 30, 1993, at 3.

domestic violence within the federal courts' jurisdiction. Edwards claims that "without a halt to such jurisdictional expansion, federal judges would be reduced to the level of justices of the peace."²⁵² Speaking at the same conference, Attorney General Janet Reno told participants, in an obvious reference to the *Lopez* case, that she would "discourage policies that encourage U.S. attorneys to take an 18-year-old . . . into federal court just to get headlines."²⁵³ Others warn,

[a]s long as the rhetoric is maintained that the most important problems facing this society should be nationalized, and as long as the economics of public choice is such that it is easier to promote substantive policies at the federal rather than at the state level, the push for federalization is not likely to subside.²⁵⁴

Judge Kiser reiterated this theme in *Brzonkala* by stating that,

[w]ithout a doubt violence against women is a pervasive and troublesome aspect of American life which needs thoughtful attention. But Congress is not invested with the authority to cure all of the ills of mankind. Its authority to act is limited by the Constitution, and the constitutional limits must be respected if our federal system is to survive.²⁵⁵

Domestic violence is a serious problem. In creating solutions to this crisis, federal lawmakers unfortunately have failed to consider values such as federalism which are deeply embedded in our system of government.

V. CONCLUSION

Recent judiciary and media events have put a national focus on the overlooked problem of domestic violence. Federal lawmakers admirably responded to this attention in an aggressive manner. While effective resolution of this problem is necessary, the hasty response by federal lawmakers is unconstitutional in consideration of the Supreme Court's recent holding in *Lopez*. This decision breaks with the Court's traditional interpretation of Congress' Commerce Clause power to enact federal legislation. Under *Lopez*, Congress may have overstepped its authority granted by the Commerce Clause of the Constitution in enacting legislation which federalizes offenses by crossing a state line when committing domestic violence and by creating a civil rights remedy in domestic abuse cases. Although initial court challenges to the VAWA on *Lopez* grounds have resulted in split decisions, both the civil rights and criminal measures are likely to be invalidated upon further challenge. This

²⁵²*Id.* at 32.

²⁵³*Id.*

²⁵⁴William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 737 (1995).

²⁵⁵*Brzonkala*, 779 F. Supp. at 801.

invalidation, however, would not defeat those battling this national problem. A challenge to this law would properly put the responsibility for finding solutions for the problems of domestic violence fully in the hands of the states and allow these "laboratories for experimentation" to continue in their efforts to find viable and individualized solutions to what is primarily a local problem.

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