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## Commerce Clause Issues in *Brzonkala v. Virginia Polytechnic Institute and State University*

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### Summary

In *Brzonkala v. Virginia Polytechnic Institute and State University*, an en banc Court of Appeals for the Fourth Circuit considered the constitutionality of 42 U.S.C. §13981, which creates a federal cause of action against any person who commits a crime of violence motivated by gender animus. Analyzing §13981 according to the framework delineated in *Lopez v. United States*, the Fourth Circuit determined that gender motivated violence is not a commercial activity and is not substantially connected to interstate commerce, rendering the statute invalid under the Commerce Clause.

Determining that widespread and pervasive acts of gender-motivated violence have a deleterious effect on the national economy and interstate commerce by removing women from the workplace, discouraging interstate travel, and reducing productivity, Congress enacted the Violence Against Women Act (VAWA) in 1994, pursuant to its authority to "regulate commerce...among the several States."<sup>1</sup> Among the various criminal and civil provisions of the Act is 42 U.S.C. §13981, which creates a substantive right to be free from crimes of violence motivated by gender, and creates a private cause of action against anyone who commits such a crime, allowing an injured party to obtain damages and other compensatory relief.<sup>2</sup>

In *Brzonkala v. Virginia Polytechnic Institute and State University*, the plaintiff brought suit under §13981 against two men who allegedly assaulted and raped her, asserting that her right to be free from gender-motivated violence had been violated.<sup>3</sup> Considering the statute pursuant to the strictures of *United States v. Lopez*, the Court of Appeals for the Fourth Circuit determined that the statute could not stand pursuant to the Commerce Clause.<sup>4</sup> The *Brzonkala* decision marks the first time that an appellate court has

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<sup>1</sup>U.S. Const. art. I, §8, cl. 3.

<sup>2</sup>42 U.S.C. §13981.

<sup>3</sup>169 F.3d 820 (4<sup>th</sup> Cir. 1999).

<sup>4</sup>*Id.* at 826-827. The Fourth Circuit also held that the statute exceeded congressional power under  
(continued...)

considered VAWA's civil rights remedy, as well as the only instance where the provision has been deemed unconstitutional.<sup>5</sup> The decision is particularly significant in light of the Fourth Circuit's reliance on *Lopez*, where the Supreme Court determined, for the first time in sixty years, that a federal statute exceeded congressional power under the Commerce Clause.<sup>6</sup> In *Lopez*, the Supreme Court adjusted the judiciary's traditional approach to Commerce Clause analysis, maintaining that while the history of Commerce Clause jurisprudence represented an expansive interpretation of federal Commerce Clause power, the judiciary maintained the ability to enforce limits on that power.<sup>7</sup> Specifically at issue was whether 18 U.S.C. §922(q), a federal statute prohibiting the possession of a firearm on school grounds, exceeded congressional authority. Arguing that the statute was a valid exercise of Commerce Clause power, the government contended that the possession of guns in school zones had a serious impact on interstate commerce by leading to violent crime and a plethora of other social ills. Addressing these arguments, Chief Justice Rehnquist discussed the judicially enforceable limits of the Commerce Clause, delineating three categories of activity which come within its ambit. First, Congress possesses the authority to regulate the use of the channels of interstate commerce. Second, Congress may regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce. Finally, Congress may also regulate activities which have a substantial relation to, and effect on, interstate commerce.<sup>8</sup>

In applying these standards to the case before it, the Supreme Court determined that §922(q) was neither a regulation of the instrumentalities or channels of interstate commerce, making the determination of the case hinge on the "substantial effects" test.<sup>9</sup> In conducting its analysis under this category, the Court identified four major problems with the regulation at issue. First, it was determined that §922(q) was a criminal statute which, by its terms, had no connection with commerce or any sort of economic enterprise, and did not play an essential role in a larger regulatory scheme. Secondly, the Supreme Court also found it significant that there was no jurisdictional element in the statute, which would ensure that firearm possession affected interstate commerce in a particular case. Third, the Court stated that the lack of congressional findings regarding the impact of the offense on the national economy detracted from any substantial relation it might have to interstate commerce. Finally, the Court held that if a regulation based on such expansive reasoning was upheld, it would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."<sup>10</sup> Determining that the substantial effects doctrine delineated in *Lopez* was controlling, the Fourth Circuit in *Brzonkala* first noted that §13981 could not be classified as a regulation of economic activity. In particular, the court explained that the "statute does not regulate the manufacture, transport, or sale of goods, the provision of services, or any other sort of

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<sup>4</sup>(...continued)

the Enforcement Clause of the Fourteenth Amendment. *Id.*

<sup>5</sup>*See, Doe v. Doe*, 929 F.Supp. 608 (D.Conn. 1996); *Seaton v. Seaton*, 971 F.Supp. 1188 (E.D.Tenn. 1997); *Ericson v. Syracuse University*, 1999 WL 212684 (S.D.N.Y. 1999).

<sup>6</sup>*United States v. Lopez*, 514 U.S. 549 (1995).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 558.

<sup>9</sup>*Id.* at 559.

<sup>10</sup>*Id.* at 561-567.

commercial transaction." Furthermore, the court stated that unlike other forms of violence, such as robbery, gender-motivated violence "is not even economic in any meaningful sense." The court also determined that §13981 lacks a sufficient "connection with any particular, identifiable economic enterprise or transaction."<sup>11</sup> To illustrate this point, the court compared the provision to the Freedom of Access to Clinic Entrances Act of 1994, which regulates protests of abortion clinics. Specifically, the court noted that control over the dynamics of abortion protests was directly linked with the operation of clinics, a tangible economic activity. According to the court, §13981 did not possess a similar connection with any economic activity. The court went on to stress that the statute possessed an even more tenuous connection to interstate commerce than did 18 U.S.C. §922(q), in that while the proper functioning of schools might be seen as closely related to commerce, "violence arising from gender animus lacks even a meaningful connection with any specific activity that might arguably be considered economic or commercial in the loosest sense."<sup>12</sup> The court also determined that the statute could not be supported as part of a larger regulatory scheme which would suffer absent regulation of intrastate gender violence. Specifically, the Fourth Circuit held that "the federal patchwork of anti-discrimination laws" could not be construed as implementing a cohesive regulatory scheme geared towards commercial or economic activity.<sup>13</sup> Clarifying this position, the court explained that §13981 could not be logically associated with other anti-discrimination statutes due to the fact that it addressed gender-motivated violence in all contexts, providing a cause of action against an alleged violent actor. The court determined that this dynamic conflicted with Title VII of the Civil Rights Act, which provides only for a remedy against gender discrimination in the work place, and targets the employer as opposed to specific offenders. This partial and occasional overlap belied any cohesive scheme, according to the court, and supported a conclusion that each statute was "written without regard for the concerns that animate the other."<sup>14</sup>

Finally, the court further held that even if §13981 could be construed as part of a larger regulatory scheme, it would nonetheless be invalid under *Lopez*, as the statute itself had no relation to economic activity. The court explained that *Lopez* did not "authorize the regulation of activity lacking any meaningful economic nexus" simply because it is part of a regulatory scheme that also regulates economic activity in certain respects. Illustrating this maxim, the Fourth Circuit pointed to the *Lopez* Court's affirmance of *Wickard v. Filburn*, where the Supreme Court ruled that the federal government could regulate the production of wheat for private, intrastate use, as such local activities could, in the aggregate, substantially affect interstate commerce. In particular, the Fourth Circuit explained that while the regulation at issue was quite broad, it nonetheless possessed a significant connection to economic activity.<sup>15</sup>

In contrast, according to the court, §13981 did not possess any connection with an economic enterprise or activity, and like §922(q), was a statute unrelated to commerce or any form of economic enterprise. The court further declared that the statute was even more tenuously related to commercial activity than the law at issue in *Lopez*, stressing the

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<sup>11</sup>*Id.* at 834.

<sup>12</sup>*Id.* at 834.

<sup>13</sup>*Id.* at 834.

<sup>14</sup>*Id.* at 835.

<sup>15</sup>*Id.* at 835.

Supreme Court's statement that to determine otherwise "would divest the words 'commerce' and 'economic' of any real meaning." As such, the Fourth Circuit refused to uphold §13981 on the basis that it possessed an insufficient economic nexus under *Lopez*.

Turning to the second prong of the *Lopez* analysis, the Fourth Circuit noted that §13981 lacked an "express jurisdictional element" which would ensure its application to offenses with a tangible connection to, or effect on, interstate commerce. In particular, the court explained that whereas the criminal provisions of the Violence Against Women Act hinged upon the crossing of state lines or some other explicit connection to interstate commerce, §13981 included no such standard. Furthermore, the court stressed that the language of the statute could not "possibly be construed to constitute such a jurisdictional element."<sup>16</sup>

The Fourth Circuit next addressed the argument that §13981 was justified in light of the fact that gender-motivated violence leads to higher medical costs and discourages economic interaction in areas and fields seen as susceptible to such violence, thereby inhibiting productivity and reducing the demand for interstate products.<sup>17</sup> Concluding that the essence of the argument was identical to that deemed unacceptable in *Lopez*, the court refused to accept such reasoning, noting that such a basis for regulation would imbue Congress with the power to regulate almost any activity, no matter how trivially related to commerce. To clarify this position, the Fourth Circuit explained that the economic impact of gender-motivated violence is only characteristic of the effect of any serious problem on interstate commerce. Specifically, Judge Luttig stated that the effects of gender violence were qualitatively identical to "violence in schools, violent crime generally, and many other less visible though still significant problems," all of which result in the loss of productivity and an ultimate, although indirect, negative impact on the national economy and, presumably, interstate commerce.<sup>18</sup>

Acknowledging that cases such as *Wickard* were premised on "sweeping and permissive reasoning," relying upon an analysis of "the aggregate effects of entire classes of activities and indulging in attenuated chains of inferences" to establish a substantial effect on interstate commerce, the Fourth Circuit stressed that *Lopez* precluded such an approach in the present case, as §13981 targeted noneconomic activity.<sup>19</sup> Clarifying this distinction, the Fourth Circuit explained that *Lopez* established that, while general regulatory statutes with a substantial relation to commerce could employ such aggregate reasoning, such an approach could not be used to uphold statutes with no relation to commerce or any sort of economic enterprise. According to the Fourth Circuit, such a piling of inferences, based upon the fact that gender-motivated violence "in the aggregate, has an attenuated, though real, effect on the economy" would remove all limits on federal authority, giving Congress an unconstitutional general police power.<sup>20</sup>

Expanding upon this observation, the Fourth Circuit noted that to allow such regulation of a noneconomic activity would enable federal regulation of any significant

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<sup>16</sup>*Id.* at 836.

<sup>17</sup>*Id.* at 836.

<sup>18</sup>*Id.* at 839.

<sup>19</sup>*Id.* at 839.

<sup>20</sup>*Id.* at 840.

activity, and would intrude "upon areas of the law 'to which States lay claim by right of history and experience.'"<sup>21</sup> The effect of this intrusion, according to the court, would be to provide a civil remedy for actions already proscribed by state criminal and tort law, upsetting the balance between state and federal criminal authority and ultimately effectuating a reallocation of state and federal judicial and law enforcement resources.<sup>22</sup> As further evidence of §13981's intrusion into traditional state law, the Fourth Circuit noted that under VAWA, a civil remedy could lie regardless of whether the act in question resulted in the filing of criminal charges, prosecution, or conviction, establishing a federal remedy for acts a state might choose to leave unpunished for reasons of state criminal law policy, prosecutorial discretion, or state tort-law policy.<sup>23</sup>

The court also held the act usurped traditional state functions by disregarding the limits of state criminal and civil law, "purportedly in response to the State's failure to enforce their criminal and tort laws against gender-motivated violent criminals." Specifically, the Fourth Circuit found it significant that in addressing this asserted failure of state justice systems, the act targeted violent actors, as opposed to providing a remedy against deficient states and their officers, as would a valid civil rights statute. The effect of this dynamic, according to the court, was to encroach "upon the States' ability to determine when and how violent crimes will be punished," as well as to blur "the boundary between federal and state responsibility for the deterrence and punishment of such crime."<sup>24</sup> As such, the Fourth Circuit explained that citizens of various states would not be able to ascertain readily whether a state or the federal government should be held accountable for failing to properly address a claim of gender-motivated violence.<sup>25</sup>

The Fourth Circuit then explained further that §13981 was targeted primarily to domestic violence, which has been traditionally regulated by the states, without congressional intervention.<sup>26</sup> Focusing on the strong state tradition of regulating such offenses, the court again declared that if the regulation was upheld, §13981 would minimize the importance of state policies related to gender violence and result in an "essentially limitless" congressional power.<sup>27</sup> The court then discussed the importance of congressional findings regarding the effects of gender-motivated violence on the national economy and interstate commerce. While noting that the legislative expertise of Congress is entitled to a degree of deference, the Fourth Circuit stressed the Supreme Court's declaration in *Lopez* that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Rather, according to the court, legislative findings serve to clarify the relationship between the regulation at issue and interstate commerce, with the constitutionality of the law ultimately hinging on the legal aspects of the substantial effects doctrine.<sup>28</sup>

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<sup>21</sup>*Id.* at 840, quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

<sup>22</sup>*Id.* at 840-841.

<sup>23</sup>*Id.* at 841.

<sup>24</sup>*Id.* at 841.

<sup>25</sup>*Id.* at 842.

<sup>26</sup>*Id.* at 842.

<sup>27</sup>*Id.* at 843.

<sup>28</sup>*Id.* at 849.

Applying this maxim, the Fourth Circuit held that the congressional findings made in support of §13981 were constitutionally insufficient. Specifically, the court explained that while voluminous findings were made regarding the deleterious economic effects of violence against women, there was no information differentiating the impact of gender-motivated violence from general acts of violence against women. Indeed, the Fourth Circuit determined that the only congressional findings addressing the effects of gender-motivated violence in particular consisted of two conclusory statements by the House and Senate asserting generally that gender-motivated violence substantially affects interstate commerce. Considering the nature of such statements, the Fourth Circuit explained that, even accepting their accuracy as a factual matter, the congressional findings could not be accepted as a sufficient legal conclusion that gender-motivated violence substantially affects interstate commerce.<sup>29</sup>

The dissent, written by Judge Motz and joined by three other judges on the court, disagreed with the majority's application of *Lopez*. Citing factors deemed sufficient by other courts to uphold §13981 on Commerce Clause grounds, Judge Motz maintained that the majority's refusal to defer to the congressional findings was improper.<sup>30</sup> Specifically, the dissent maintained that a proper interpretation of *Lopez* would require a court defer to congressional findings which possessed a rational basis.<sup>31</sup> Upon analyzing the legislative findings made by Congress, the dissent maintained that a sufficient showing of "the substantial effect that gender-based violence has on interstate commerce and the national economy" had been made, irrespective of the majority's holding that the findings illustrated only the effect of general violence on women and the economy.<sup>32</sup> The dissent further argued that the regulation was justified, as such violence could rationally be considered as detrimental to the economy as the activity at question in *Wickard v. Filburn*.<sup>33</sup> The dissent went on to fault the majority's determination that a valid Commerce Clause regulation must regulate economic activity, possess a jurisdictional element, or bear a meaningful connection with an economic activity. Specifically, the dissent maintained that the effects identified in the legislative findings supported Commerce Clause based regulation under *Lopez*, arguing that the mere fact that an effect becomes general does not render it insufficiently substantial.<sup>34</sup>

Compared with the arguments of the dissent and the contrary holdings of other courts addressing the issue, the majority's exhaustive opinion in *Brzonkala* belies a fundamental difference of opinion regarding the scope of congressional power under the Commerce Clause. Given such differing interpretations regarding the validity of §13981, it seems inevitable that the Supreme Court will address the issue, thereby clarifying the effect of its decision in *Lopez*.

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<sup>29</sup>*Id.* at 850.

<sup>30</sup>*See* note 5, *supra*.

<sup>31</sup>*Id.* at 912-913.

<sup>32</sup>*Id.* at 913.

<sup>33</sup>*Id.* at 916.

<sup>34</sup>*Id.* at 917, 919-920.