

RECENT DEVELOPMENT

TITLE III OF THE VIOLENCE AGAINST WOMEN ACT: CONSTITUTIONALLY SAFE AND SOUND

On November 12, 1996, News Channel 30 in St. Louis reported the following four stories at the inception of its broadcast:

* Mr. Baumruk, a man who was convicted in 1992 of killing his wife in a Missouri courthouse during divorce proceedings, was being considered for release from the mental health hospital to which he was confined after successfully pleading temporary insanity.

* A woman expressed fear for her life because Mr. Pennington, her former husband who was convicted of shooting her after she told him she wanted a divorce, was out on temporary release before sentencing.

* Drill Sergeant Blakely at Fort Leonard Wood, Missouri, was being charged with aggravated sexual assault.

* The sexual harassment and sexual assault investigation within the army was uncovering numerous stories at the base in Aberdeen, Maryland.¹

I. INTRODUCTION

In 1994, Congress passed the Violence Against Women Act ("VAWA"),² which was created to address "the escalating problem of violence against women."³ As part of this measure, Congress established a federal civil rights cause of action⁴ for victims of violent crimes⁵ motivated by gender.⁶ The

1. *Ten O'Clock News* (KDNL television broadcast, Nov. 12, 1996). This summary was derived partly from notes taken by the author during the broadcast and was checked against and expanded by the information generously provided by Rick Brown, News Director, Channel 30.

2. The VAWA was part of the Violent Crime Control and Law Enforcement Act of 1994, PUB. L. NO. 103-322, 108 Stat. 1796.

3. S. REP. NO. 103-138, at 37 (1993).

4. 42 U.S.C.A. § 13981(b)-(c) (1995). Section (b) states: "All persons within the United States shall have the right to be free from crimes of violence motivated by gender."

Id. Section (c) states:

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

Id.

5. The term "crime of violence" means—

purpose of this remedy, which constitutes Title III of the VAWA, is to “protect the civil rights of victims of gender motivated violence and to promote the public safety, health, and activities affecting interstate commerce.”⁷

In the summer of 1996, the United States District Court for the District of Connecticut heard *Doe v. Doe*,⁸ in which the defendant claimed that Title III was unconstitutional because Congress did not have the authority to enact it under the Commerce Clause.⁹ The court rejected the defendant’s claim and

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

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

42 U.S.C. A § 13981(d)(2) (1995).

6. Crime of violence motivated by gender means “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” Although the Act is titled the Violence Against Women Act because women disproportionately suffer gender-motivated crimes, *see* S. REP. NO. 138, at 37, and the funding of services and programs is consequently directed at women, *see id.* at 42-47, the “motivated by gender” language under Title III is gender neutral and covers men as well. Because the Act was created in response to violence against women, however, this article will focus on and talk in terms of violence against women. For a discussion of crimes that disproportionately affect women and the increasing “gender gap” in violence, *see* George P. Choudas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, the Legal Invisibility of Its Gender-Based Victims*, 44 EMORY L.J. 1069, 1083-86 (1995). *See also* W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 578 (1993) (stating that 97% of all sex crime victims are women) (citation omitted).

7. 42 U.S.C.A. § 13981(a) (1995).

8. *Doe v. Doe*, 929 F. Supp. 608 (D. Conn 1996).

9. *Id.* at 610; *see* 42 U.S.C.A. § 13981(a) (1995). The scope of this Recent Development is limited to the constitutionality of the VAWA under the Commerce Clause. This Recent Development will not address whether the Fourteenth Amendment, Congress’s additional basis of authority, grants Congress the power to enact the VAWA. For a discussion of this issue, *see Brzonkala v. Virginia Polytechnic and State University*, 935 F. Supp. 779, 793-801 (W.D. Va. 1996); Brief for Intervenor-Appellant United States at (12-16), *Brzonkala v. Virginia Polytechnic and State Univ.*, (4th Cir.) (No. 96-1814, 96-2316) [hereinafter Intervenor Brief], available at <<http://www.soconline.org/LEGAL/BRZONKALA>> (visited Apr. 7, 1997); and Brief for Appellant, *Brzonkala v. Virginia Polytechnic and State Univ.*, (4th Cir.) (No. 96-1814, 96-2316) [hereinafter Brzonkala Brief], available at <<http://www.soconline.org/LEGAL/brzonkala>> (visited Apr. 7, 1997); David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163, 171-87 (1993). *See generally* Choudas, *supra* note 6. At least one author has argued that Congress could alternately achieve some of the VAWA’s goals under its Spending Clause power, by allocating the money attached to the VAWA on the condition that the states enact stricter penalties for crimes of violence against women. *See* Michelle W. Easterling, *For*

held that Title III was a valid exercise of Congress' Commerce Clause power.¹⁰ Approximately one month later, however, the United States District Court for the Western District of Virginia heard the same constitutional challenge in *Brzonkala*¹¹ v. *Virginia Polytechnic and State University*¹² and ruled that Title III was unconstitutional.¹³ Although the *Doe* case has settled,¹⁴ the *Brzonkala* case is being appealed¹⁵ and other courts are certain to have the same issue presented to them. The outcome of these decisions will determine whether the victims of gender-based violent crime will be able to vindicate their rights by suing the perpetrator in a federal forum or will have to rely on state actions and available remedies.¹⁶ This distinction is not only related to personal empowerment, which is critical in these kinds of cases,¹⁷ but is also

Better or Worse: The Federalization of Domestic Violence, 98 W. VA. L. REV. 933, 951-52 (1996).

For a policy-based critique of Title III, see Wendy R. Willis, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2201 (1992) (stating that the "bill does not acknowledge that the majority of sexual assault is gender motivated . . . [and that] by adopting traditional definitions of rape used in criminal law, the bill may require the plaintiff to demonstrate violence beyond the sexual assault itself"); Frazee, *supra*, at 213 (contending that Title III's use of the traditional civil rights model for gender-motivated violence "constructs legal identities in ways that might harm women" and "does not address the reality of gender-based violence"); and Sara E. Lesch, *A Troubled Inheritance: An Examination of Title III of the Violence Against Women Act in Light of Current Critiques of Civil Rights Law*, 3 COLUM. J. GEND. & L. 535, 539-42 (1993) (claiming that Title III proves inadequate for victims who fall into more than one category that is protected against discrimination, focuses on an inappropriate intent requirement, and has a limited impact on systemic inequities).

For suggestions for amending Title III in response to some of these policy critiques, see Frazee, *supra*, at 241-56.

10. *Doe*, 929 F. Supp. at 617.

11. The plaintiff's name is pronounced "braun-ka-la"—the "z" is silent. *Brzonkala Brief*, *supra* note 9, at 1.

12. 935 F. Supp. 779 (1996).

13. *Id.* at 793, 801.

14. Telephone Interview with Patricia Broderick, Special Counsel to the Office of Violence Against Women (Dec. 18, 1996).

15. See generally *Brzonkala Brief*, *supra* note 9; *Intervenor Brief*, *supra* note 9.

16. See *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1530-43 (1993) (analyzing variety of state actions available to victims of gender-based crimes) [hereinafter *Developments*].

17. See Frazee, *supra* note 9, at 254 (explaining that civil rights actions provide groups "traditionally powerless in the legal system" with "at least limited power to control the process and to place themselves . . . against their attackers. Criminal trials, when they do occur, are often hostile settings for victims of gender-motivated violence: they may find themselves under more scrutiny than the defendant and have little, if no, say over the strategy which the prosecution pursues") (citation omitted); Lesch, *supra* note 9, at 539 ("This cause of action would counteract the negative effects of a criminal justice system that can be patronizing and insensitive to the needs of women who have been victimized by violence. By letting the survivor . . . control the course of her case . . . the case itself would become part of the remedy that functions to restore equality."); Willis, *supra* note 9, at 2200

filled with practical meaning, given the severe inadequacies of states' current responses and remedies.¹⁸ Furthermore, the existence of Title III has crucial symbolic meaning,¹⁹ and perhaps related practical implications,²⁰ by helping dictate whether society overtly recognizes such crimes as meriting as much outrage as bias-motivated crimes against other groups.²¹

Part II of this Recent Development briefly reviews the legislative history behind the VAWA, placing particular emphasis on the history related to Title III. Part III summarizes the analyses of the *Doe* and *Brzonkala* cases and then critiques their analyses in light of the VAWA's legislative history, the Supreme Court's recent Commerce Clause case *United States v. Lopez*, and other Commerce Clause cases. Part III concludes that Title III is a valid exercise of Congress' Commerce Clause power.

II. LEGISLATIVE HISTORY²²

A. Congressional Findings

The Violence Against Women Act was first introduced in 1990,²³ was

("The Senate Judiciary Committee recognizes that 'the victims of this violence are reduced to symbols of group hatred [with] no individual power to change or escape. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated.") (footnote omitted) (quoting S. REP. NO. 102-197, at 43 (1991)).

18. See *infra* notes 46-52 and accompanying text.

19. See Lesch, *supra* note 9, at 539 ("[T]itle III imbues the struggle for gender parity with a prominence and priority that our government appropriately accords to only a few issues. . . . Federalizing this issue would send a powerful message that the violent enforcement of a gender caste system will not be tolerated."); see also *infra* note 20 and accompanying text.

20. See *infra* Part II.B (discussing the hope of Title III supporters that the provision will help to change attitudes about gender-motivated violence); see also Lesch, *supra* note 9, at 539; Elizabeth M. Schneider, *Epilogue: Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245, 1250 (1995) (contending that "deep problems of denial and resistance to integrating insights about domestic violence into both individual behavior and social policy . . . stand in the way of social change, and the way in which these attitudes are reinforced by traditional concepts of privacy"); cf. *Violence Against Women: Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary House of Representatives*, 102d Cong. 8 (1992) ("I might add a point on that study [from Rhode Island that the Chairman] mentioned . . . where it said one-quarter of all the young men of junior high school age believed that if a man spends \$10 on a woman he is entitled to force sex on her. That is startling. What is even more startling is that one-fifth of the girls thought the same thing . . . We have a cultural problem in this country") (statement of Sen. Biden) [hereinafter *Violence Against Women Hearing*].

21. See *infra* notes 51-52 and accompanying text.

22. For a detailed description of the legislative history through most of 1993, see S. REP. NO. 138, at 39-41 (1993) and H.R. REP. NO. 103-395, at 28-29 (1993).

23. H.R. REP. NO. 395, at 28 (1993).

reintroduced in 1991 and 1993,²⁴ and was finally passed in 1994. From 1990 to 1994, extensive hearings were held on the bill regarding the prevalence and impact of violence against women.²⁵ For example, Congress learned that between 1988 and 1992, violence was the “leading cause of injury to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined.”²⁶ As of 1988, three out of four American women were likely to be the victims of violent crimes in their lifetime.²⁷ Moreover, the rate of violent crimes against women has been increasing.²⁸ For example, between 1988 and 1992, the rate of incidence of rape rose four and a half times as fast as the total crime rate²⁹--meaning one rape every five minutes.³⁰ Estimates of the rate at which rape is reported indicate that only seven

24. *Id.*

25. See *Violence Against Women Hearing*, *supra* note 20; STAFF OF SENATE COMM. ON JUDICIARY, 102D CONG., 2D SESS., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA (Comm. Print 1992) [hereinafter Comm. Print]; H.R. REP. NO. 103-395; S. REP. NO. 103-138; see also *infra* note 72 and accompanying text.

26. H.R. REP. NO. 103-395, at 25 (citation omitted).

27. *Id.* (citing U.S. DEP'T. OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 29 (2d ed. 1988)).

28. Congress heard that since 1974, “the rates for assault and many other violent crimes against women have increased dramatically, while the rates for the same crimes against men have actually declined.” 139 Cong. Rec. H10,363 (daily ed. Nov. 20, 1993) (statement of Sally Goldfarb) (citations omitted), *quoted in* Easterling, *supra* note 9, at 938-39.

29. H.R. REP. NO. 103-395, at 25 (citing FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T. OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 7, 25 (1992)).

30. *Id.* A 1992 study found that approximately 12.1 million—or 13 percent—of women, had experienced a minimum of one forcible rape during their lifetime. Angela Browne, *Family Violence and Homelessness: The Relevance of Trauma Histories in the Lives of Homeless Women*, 63 AM. J. ORTHOPSYCHIATRY 370, 370 (1993) (citation omitted). In 1991, 106,593 completed forcible rapes and 153,120 rapes were reported. ADAM DORBIN ET. AL., STATISTICAL HANDBOOK ON VIOLENCE IN AMERICA 44, 56 (1996). (The Handbook only includes rapes against women in these and the following statistics.) Between 1981 and 1982, and between 1992 and 1993, the number of reported rapes declined slightly; otherwise, the number of rapes has steadily increased since 1960. *Id.* Of completed rapes, 13.7% were committed by a spouse, 5.1% by an ex-spouse, 2.6% by another relative, 39.5% by a well-known but unrelated person, 28.5% by a casual acquaintance, and only 10.6% by a stranger. *Id.* at 65. In 1993, there were 416,590 reported rapes and sexual attacks on women while there were 41,930 rapes and sexual attacks reported by men. *Id.* at 62. Excluding homicide, rape is the most devastating crime for its victims—the emotional scars and continued fear as well as any physical harm can profoundly affect the victims for years. CHARLES W. DEAN & MARY DEBRUYN-KOPS, THE CRIME AND CONSEQUENCES OF RAPE, at v (1982).

For a brief discussion of rape in which men are the victims, see Frazee, *supra* note 9, at 221-22 (reporting that “up to ten percent of all rape victims are men” and noting that “[t]hough many have used examples of rape against men to belittle the reality of sexual violence against women, only by acknowledging male rape can one understand critical components of male sexual violence”) (citations omitted).

percent³¹ to about half of all rapes are reported.³²

Congressional hearings also showed that, in addition to rape, domestic violence disproportionately plagues women.³³ Accounting for underreporting, approximately four million American women are battered annually by their husbands or partners.³⁴ In 1991, at least 21,000 domestic crimes were reported to the police each week, which translated into at least 1.1 million aggravated assaults, rapes, and murders³⁵--more than twice the number of reported robberies.³⁶ Unsurprisingly, "about 35 [percent] of women visiting hospital emergency rooms were there due to injuries sustained as a result of domestic violence."³⁷ In addition, Congress found that at least fifty percent of homeless women were fleeing domestic violence.³⁸

The cost of this violence is seen through the one million women each year that seek medical attention for injuries caused by domestic violence.³⁹ The

31. Willis, *supra* note 9, at 2199 n.21 (quoting *Legislation to Reduce the Growing problem of Violent Crime Against Women: Hearings on S. 2754 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 77 (1990)). "Rape remains the most under-reported of all major crimes." *Id.*

32. H.R. REP. NO. 103-395, at 25-26 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, VICTIMS OF VIOLENCE CRIME 8 (1991)).

33. Ninety-five percent of victims of domestic violence are women. H.R. REP. NO. 103-395, at 26.

34. *Id.* (citations omitted).

35. S. REP. NO. 103-138, at 37 (1993). "Unreported domestic crimes have been estimated to be more than three times this [number]." *Id.* Approximately one-third of all women murdered were murdered by their husbands or boyfriends. *Id.* at 41. For a brief discussion of the underreporting of violent assaults, see Choundas, *supra* note 6, at 1086-87.

36. Comm. Print, *supra* note 25, at 2.

37. *Id.* at 26 (citations omitted); see also S. REP. NO. 103-138, at 41 (finding that the country spends \$5 to \$10 billion a year on health care, criminal justice and other social costs of domestic violence) (citation omitted).

38. S. REP. NO. 101-545, at 37 (1990). An in-depth study of 141 homeless women revealed that 63% had been assaulted by an adult partner and 58% had been raped, reflecting higher rates of such traumas than those found among a comparable group of housed women. Browne, *supra* note 30, at 372 (citation omitted). Similar studies showed: 41% of homeless women had been physically assaulted by a male partner, compared to 20% of the housed women; that 34% of homeless, versus 16% of housed, women reported spousal violence; and 27% of homeless, versus 17% of housed, women reported assaults or threats of violence by at least one intimate partner. *Id.* (citations omitted).

39. S. REP. NO. 103-138, at 41 (citations omitted); see also H.R. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1851 (finding that crimes of violence have a substantial adverse effect on interstate commerce by increasing medical and other costs); H.R. REP. NO. 103-395, at 26, (stating that about "35% of women visiting hospital emergency rooms are there due to injuries sustained as a result of domestic violence"). The Surgeon General reported in 1993 that battering was the "single largest cause of injury to women in the United States." Easterling, *supra* note 9, at 939 (citations omitted).

These traumas also result in a number of common reactions, including depression, withdrawal, and compromised functioning in daily activities. LINDA E. LEDRAY, RECOVERING FROM RAPE 90-92, 95 (2d ed. 1986); see also DEAN & DEBRUYN-KOPS, *supra* note 30, at 110-12; LIZ KELLY, SURVIVING

impact that the violence has on the economy is also evident in the adverse effect that it has on women's participation in the workforce. For example, some women do not accept jobs because they fear that the hours or location where they would need to work would be too risky.⁴⁰ Others cannot work or are limited in what they can do because the abusive spouse wants to maintain control over them.⁴¹ Congress also found that "almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime."⁴² One of the negative effects of these statistics is that national productivity decreases to the extent that interstate commerce is substantially affected.⁴³ For

SEXUAL VIOLENCE 188 (1988); Browne, *supra* note 30, at 373-74. One of the most profound reactions found among these victims is Post Traumatic Stress Disorder ("PTSD"). Browne, *supra* note 32, at 376; LEDRAY, *supra*, at 98-99. "PTSD syndrome has been used as an instrument to understand a range of psychological responses to traumatic experiences, from natural disaster or military combat to rape and other forms of criminal attack." Browne, *supra* note 30, at 376 (citations omitted). Some of the symptoms of PTSD are: difficulty concentrating, loss of interest in activities the victim once enjoyed, loss of interest in being with other people, and a continued reliving of the rape in the mind. LEDRAY, *supra*, at 98. "[S]tudies indicate that perception of a threat to life, perception of helplessness in the face of danger, injury during a traumatic event, and rape and physical assault for women are particularly implicated in the onset of PTSD." Browne, *supra* note 30, at 376. (citations omitted). In many cases, PTSD is the most accurate diagnosis for victims of domestic violence who are suffering various emotional consequences from the abuse. *Id.* at 376. (citations omitted). A 1992 national survey by the National Victim Center found that 31% of all rape survivors developed PTSD at some time and an estimated 1.3 million women were still suffering symptoms of it up to two years after a rape. LEDRAY, *supra*, at 99. For a breakdown of the rate of PTSD among different groups of rape and other sexual assault victims, see DORBIN, *supra* note 30, at 255-56.

40. S. REP. NO. 103-138, at 54 (citations omitted). While "42 percent of deaths on the job of women are homicides, only 12 percent of the deaths of men on the job are homicides." *Id.* at 54 n.70; see also *Women and Violence: Hearing Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. 69 (1990) (statement of NOW Legal Def. & Educ. Fund) (stating that gender-motivated violence deters women from using public transportation and, therefore, "acts as a barrier to mobility, particularly for those women who have no alternative to public transportation because of economic constraints"). Withdrawal often prevents female victims of rape from traveling or moving as freely. DEAN & DEBRUYN-KOPS, *supra* note 30, at 111; KELLY, *supra* note 39, at 199; LEDRAY, *supra* note 39, at 95.

41. *Violence Against Women Hearing*, *supra* note 20, at 117 (testimony of Marcella Maxwell, Chairperson, New York City Commission on the Status of Women).

42. S. REP. NO. 103-138, at 54 (citations omitted). A study of victims of sexual assaults (i.e., rapes or attempted rapes) by someone the victim knew from work, found that 19% of victims quit their jobs and about 40% suffered negative effects to their performance. Beth E. Schneider, *Put Up and Shut Up: Workplace Sexual Assaults*, 5 GENDER & SOCIETY, 533, 543, 545 (1991). The study also found that 17% of 372 randomly sampled women reported at least one completed or attempted workplace sexual assault. *Id.* at 537.

43. H.R. REP. NO. 103-711, at 385. Victims' reduced ability to function or the need to move in order to protect oneself frequently results in lost productivity, underemployment, as well as the loss of a job. DEAN & DEBRUYN-KOPS, *supra* note 30, at 112; KELLY, *supra* note 39, at 189, 196, 215; LEDRAY, *supra* note 39, at 91, 103; Julie Goldscheid & Pamela Coukas, *Violence Against Women Affects the Workplace: Legal Remedies for Women and Advocates*, 9 CLEARINGHOUSE REV. 195, 195-

example, related absenteeism from work has been estimated to cost employers three to five billion dollars annually.⁴⁴ Interstate commerce is also adversely affected by the fact that women are discouraged from traveling interstate, and therefore, from engaging in employment in interstate business.⁴⁵

Congress not only found that profound economic and social costs emanate from gender-motivated violence but also concluded that state remedies have responded inadequately to this social ill.⁴⁶ Legislative findings indicated that "crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men."⁴⁷ For example, there is "overwhelming evidence . . . that gender bias permeates the court system."⁴⁸

97 (1996).

44. *Women and Violence: Hearing Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. 58 (1990) (statement of Helen R. Neuborne, executive director of NOW Legal Defense and Education Fund).

45. H.R. REP. NO. 103-711, at 385.

46. *Id.*; S. REP. NO. 103-138, at 49. For more discussion of the biases and inadequacies among juries, prosecutors, and judges as well as the inadequacy of civil remedies, see Intervenor Brief, *supra* note 9, at 8-11; and *infra* notes 47-50 and accompanying text.

47. S. REP. NO. 103-138, at 49 (citations omitted). Congress also found that "[w]omen often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination." *Id.* Furthermore,

[j]udges, juries, prosecutors, and police officers . . . may require a woman: to have physical injuries; to tell a consistent story; to be willing to take a lie detector test, to not have waited for more than 48 hours before reporting the incident, to not have engaged in premarital or extramarital sex, to have had no previous social contact with her assailant, and not to have reached the location of the rape voluntarily.

Id. at 45-46. Judges and juries may also demand corroborating evidence even when the law does not require it, or they may challenge the credibility of victims of sexual assault more than victims of other crimes. *Id.* at 45. "Faced with limited time, personnel, and resources, however, prosecutors often give domestic violence cases low priority and sometimes even try to persuade battered women not to prosecute." *Developments, supra* note 16, at 1540.

For a discussion of state responses, including marital rape (immunity) laws, stalking statutes, arrest policies (e.g. mandatory arrest), prosecution policies (e.g. no-drop policies), and diversion to counseling programs, and weaknesses in these responses, see *id.*, at 1533-42.

48. S. REP. NO. 103-138, at 49; see also H.R. REP. NO. 103-711, at 385 (stating that "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled"); S. REP. NO. 102-197, at 34 (1991) (describing a Florida judge who "commented during sentencing that he felt sorry for a confessed rapist because his victim was such a 'pathetic' woman") (citation omitted); Choundas, *supra* note 6, at 1086-88 ("The failure of the law to take into account the particular circumstances that make women most vulnerable to criminal assault, the cavalier and prejudiced indifference with which its application and enforcement are conducted in those instances in which they are most urgently needed, and the unwillingness of the legal system to view the victimization of women as a systematic phenomenon rooted in historical patterns of discrimination all extend the disproportionate nature of women's victimization far beyond the point at which the physical assault

Women who are raped by an acquaintance are often accused of provoking the attack⁴⁹ and seven states still do not consider marital rape a prosecutable offense.⁵⁰ While “almost every [s]tate has passed laws that increase criminal penalties” for hate crimes (i.e. crimes motivated by bias)⁵¹ and many of these laws provide civil remedies for victims, fewer than a dozen have covered gender bias as of 1991.⁵² Federal law has duplicated this neglect of gender hate crimes, as evidenced by the Hate Crimes Statistics Act,⁵³ which requires the collection of statistics on crimes motivated by race, ethnicity, national origin, and sexual orientation, but not on crimes motivated by gender.

has been completed.”) (citations omitted).

49. S. REP. NO. 102-197, at 47; *see also* Eileen N. Wagner, *The Secret On-Campus Adjudication of Sexual Assault*, *2 (Nov. 1996) (“Illogical assumptions about sexual contact turn the criminal analysis of rape on its head, focusing the probing element of criminal intent away from the usually male perpetrator and onto the usually female victim.”), *available at* <<http://www.soconline.org/LEGAL/BRZONKALA>> (visited Apr. 7, 1997).

50. S. REP. NO. 102-197, at 45 n.50 (citation omitted). Furthermore, an additional 26 states allow prosecutions only under limited circumstances. *Id.* (citation omitted) For further discussion of the prevalence of marital rape and the barriers to prosecuting marital rape, including a complete bar, lower levels of criminality, and limitations on circumstances covered, *see Developments, supra* note 16, at 1533-34.

In addition to the inadequacies of state criminal law, state tort law proves an insufficient remedy for a victim’s need for vindication and compensation. *See id.* 1430-1533 (discussing interspousal tort immunity, uniquely strict standards for intentional infliction of emotional distress claims, and statutes of limitations); *see also* Willis, *supra* note 9, at 2203 (“While state tort laws may allow victims to sue for damages, the focus is on the physical injury and not on the additional injury imposed by class-based animus.”).

51. S. REP. NO. 103-138, at 48.

All hate-crime laws impose harsher penalties for offenses committed because of the victim’s possession of a set of characteristics designated by statute and based on group membership. The laws differ, however, in two significant respects. First, states employ different methods to increase the penalties for bias motivated crimes. . . . [T]he other significant variation . . . [is that] state legislatures have adopted different combinations of the following as the statutory set of characteristics triggering harsher penalties: race, color, religion, national origin, gender, sexual orientation, disability, and veteran status.

Choundas, *supra* note 6 at 1078-81 (citations omitted); *see also* Frazee, *supra* note 9, at 188-97 (discussing hate crime statutes and describing different forms of hate crime laws).

52. S. REP. NO. 103-138, at 48. “While race, color, religion, and national origin are universally included in hate-crime legislation as hate-crime motives, twenty-one states fail to include gender within their statutes.” Choundas, *supra* note 6, at 1081 (citing all 21 statutes) (citation omitted). For an explanation as to why gender has been excluded, *see* Frazee, *supra* note 9, at 197-205. Mr. Frazee also discusses the problems of simply adding gender to traditional models of hate crime statutes as a remedy for gender-based violence. *Id.* at 206-12. For an Equal Protection critique of hate crime statutes that exclude gender, *see* Choundas, *supra* note 6, at 1095-1106.

53. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (not codified in U.S.C.).

B. *The Response: VAWA and Title III*

In response to these findings, Congress decided to enact the Violence Against Women Act, which was “intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence.”⁵⁴ As part of this effort, the VAWA created Title III, which provides a federal civil rights remedy⁵⁵ for gender-based violent crimes in order to help make such crimes considered as serious as other hate crimes⁵⁶ and to provide victims “the opportunity to vindicate their interests.”⁵⁷ Having recognized under Title

54. S. REP. NO. 103-138, at 38; *cf.* Choundas, *supra* note 6, at 1082-83 (“The frequency with which women are targeted for violent assault, coupled with the fact that women constitute half the population, fuels a perception of such acts as essentially random and unrelated manifestations of the general danger of social violence to which all are exposed. . . . The reality, however, is one in which women suffer injury and death precisely because of their gender.”).

55. The Act also authorizes \$1.67 billion over six years for grants to support state and local law enforcement and prosecution efforts to reduce violent crime against women, 42 U.S.C. § 3796gg (1994), for education and prevention programs, 42 U.S.C. § 300w-10 (1994), for battered women’s shelters, 42 U.S.C. § 10409(a)(1994), and for community programs on domestic violence, 42 U.S.C. § 10418 (1994). In addition, the Act establishes two new federal felonies for interstate domestic violence and interstate violation of a protection order, 18 U.S.C. §§ 2261, 2262 (1994), and proposes amendments to the Federal Rules of Evidence regarding the admissibility of the past sexual behavior of victims in criminal and civil sex offense cases, 28 U.S.C. § 2074 (1994). For a discussion of the battle that was fought in Congress to obtain an actual appropriation of funds to realize these plans, see generally Patricia Schroeder, *Stopping Violence Against Women Still Takes a Fight: If in Doubt, Just Look at the 104th Congress*, 4 J. L. & POL’Y 377 (1996). See also Schneider, *supra* note 20, at 1249 (stating that the concerns that generated the VAWA “have not yet been translated into resources for battered women or a broad range of policy initiatives”). In addition, the Omnibus Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), provides for a gun ban for individuals convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(8) (1994).

56. S. REP. NO. 103-138, at 38. Congress intended to help establish that such crimes are “not merely an individual crime or a personal injury, but [are] also a form of discrimination.” *Id.* at 48. Consequently, “[t]he provision’s purpose is to provide an effective anti-discrimination remedy for violently expressed gender prejudice.” *Id.* at 38; see also S. REP. NO. 101-545, at 41 (1990).

[G]ender-crime victims may be said to be particularly deserving of enhanced protection in at least three respects. First, their exclusion from the scope of statutes extending heightened protection to other targeted groups further aggravates the disproportionate extent to which they are subjected to the harms of bias-motivated violence. Second, the unique resistance and prejudicial indifference of the criminal justice system with which women victims are confronted tend to amplify the disproportionate harms of the violence they experience. Third, the everpresent and ubiquitous threat of gender-motivated violence arguably inspires a fear more comprehensive, invasive, and inhibiting than that experienced by other types of bias-crime victims.”)

Choundas, *supra* note 6, at 1094 (citations omitted).

57. H.R. REP. NO. 103-711, at 385 (1994). The Judiciary Committee noted that “criminal laws are intended to vindicate the State’s interest in the protection of its citizens, not the victim’s interest in equal treatment Similarly, State civil laws are not focused on the discriminatory aspect of gender-motivated crime. . . . [S]tate tort law was never intended to protect individuals’ civil rights.” Willis,

VII of the 1964 Civil Rights Act that gender discrimination can take the form of a lost pay raise or promotion, Congress acknowledged through Title III that gender discrimination may disguise itself in the form of a violent criminal attack.⁵⁸

The cause of action under Title III is strictly limited to violent felonies motivated by gender.⁵⁹ Consequently, in order to state a claim, a victim must show that the crime was generated, at least in part, by the victim's gender.⁶⁰ This means that random crimes in the home or elsewhere cannot serve as a basis for a Title III claim.⁶¹ As a result, Title III's coverage excludes many of the "traditional" domestic violence cases due to the difficulty of proving that the abuse resulted partly from the attitude of the male partner towards females rather than towards his wife in particular.⁶²

Title III was the most controversial provision of the VAWA.⁶³ The most lasting and vehement criticism came from federal judges, including Chief Justice Rehnquist, and rested upon a theory that Title III would overwhelm the federal judiciary with allegedly gender-motivated cases, particularly domestic violence cases.⁶⁴ The federal judiciary did not, however, object to

supra note 9, at 2202-03 (alterations in original) (citations omitted).

58. S. REP. NO. 103-138, at 38.

59. *Id.* at 50.

This does not mean that a plaintiff must prove every element of her injury beyond a reasonable doubt. Rather, the plaintiff must show by a preponderance of the evidence, a set of facts that, if taken as true, would meet the definition of a felony.

Id. at 50 n.57. "Proof of 'gender motivation' under [T]itle III should proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws." *Id.* at 52. For a discussion of the proof requirements, see *id.* at 52-54. See also 42 U.S.C.A. § 13981(e)(1) (1995) (establishing preponderance of the evidence standard for gender-motivated crimes).

60. *Violence Against Women Hearing, supra* note 20, at 10. As a result, a woman cannot establish a cause of action by saying, "I am a woman; I have a bruise; ergo, I have a civil rights claim." *Id.*

61. *Id.* at 26.

62. *Id.* at 25-26; see also Frazee, *supra* note 9, at 190 (explaining that "[i]n acquaintance situation, especially in 'domestic' situations, proving that one was selected for an attack as a representative of one's entire gender will prove a nearly impossible burden [because Title III contains] . . . gendered logic that permeates model bias crime statutes").

63. *Violence Against Women Hearings, supra* note 20, at 9 (statement of Sen. Biden, original sponsor of the VAWA). Some critics initially asserted that the civil rights provision was unconstitutional but, after hearings with numerous scholars, that criticism soon dissipated. *Id.* at 9 (statement of Sen. Biden). Another concern raised but later dropped was that Title III would encourage women to raise false claims in order to obtain more alimony. *Id.* at 11 (statement of Sen. Biden).

64. *Id.* at 8, 10-11, 25. For a discussion of this and other federalism arguments for and against the VAWA, see Easterling, *supra* note 9, at 943-48. For a discussion of why fear of a flood of federal litigation arising from Title III is unfounded, see *Developments, supra* note 16, at 1546-47 (concluding that the federalism objections to the VAWA that are based on policy grounds "continue to mistake

Title III on constitutional grounds.⁶⁵

III. THE CONSTITUTIONALITY OF TITLE III

A. Summary of the Cases

*Doe v. Doe*⁶⁶ presented the claim of a woman who had been “systematically and continuously inflicted [with] a pattern of physical and mental abuse and cruelty” by her husband for seventeen years.⁶⁷ In its Commerce Clause analysis,⁶⁸ the *Doe* court relied on *United States v. Lopez*⁶⁹ and looked to whether a “rational basis”⁷⁰ existed for Congress to conclude that gender-based violence “substantially affect[s] interstate commerce.”⁷¹ After reviewing the legislative history,⁷² the *Doe* court held that the congressional findings and reports “qualitatively and quantitatively demonstrate the substantial effect on interstate commerce of gender-based violence.”⁷³

The court distinguished the federal civil rights remedy under the VAWA from the Gun Free School Zone Act struck down in *Lopez*. The court stated that the Gun Free School Zone Act rested on “only theoretical impact

domestic violence for a family squabble and therefore reflect the antiquated attitudes that the bill aims to eradicate. When violence against women is seen in its true light . . . , this reluctance to involve the federal courts appears to be a thinly-veiled excuse for society’s continued refusal to treat violent crime against women with the seriousness it deserves”.

65. *Id.* at 27-28. For an analysis of the constitutionality of Title III under the Commerce Clause by the Senate Committee on the Judiciary, see S. REP. NO. 103-138, at 54-55 (1993).

66. 929 F. Supp. 608 (D. Conn. 1996).

67. *Id.* at 610. The violence included “throwing her to the floor, kicking her, throwing sharp and dangerous objects at her, threatening to kill her, and destroying [her] property.” *Id.* The plaintiff also alleged “that the defendant forced her to be a ‘slave’ and perform all manual labor, including maintaining and laying out his clothes for his numerous dates with his many girlfriends and mistresses.” *Id.*

68. Although the defendants in both *Doe* and *Brzonkala*, challenged the constitutionality of Title III under both the Commerce Clause and the 14th Amendment, the *Doe* court, having found a constitutional basis for Title III under the Commerce Clause, declined to discuss the constitutionality of Title III under the 14th Amendment. *Id.* at 612 n.5, 617.

69. 115 S. Ct. 1624 (1995).

70. In applying the rational basis test, the *Doe* court cited to *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981), which stated the rational basis test that was cited with approval and applied by the *Lopez* Court. *Doe*, 929 F. Supp. at 612; see *Lopez*, 115 S. Ct. at 1629.

71. *Doe*, 929 F. Supp. at 612 (citing *Lopez*, 115 S. Ct. at 1629-30).

72. *Doe*, 929 F. Supp. at 610-11. The court reflected upon the “numerous hearings [in which Congress] . . . amassed substantial documentation on how gender-based violence impacts interstate commerce. . . .” *Id.* (citations omitted).

73. *Id.* at 613.

arguments” and lacked evidence of the requisite connection to interstate commerce that was established under the VAWA.⁷⁴ While the *Lopez* Court was left to speculate⁷⁵ in order to find the necessary connection between the regulated activity and interstate commerce, the “extensive compilation of data, testimony, and reports [behind the VAWA show a] . . . repetitive nationwide impact of women withholding, withdrawing or limiting their participation in the workplace or marketplace in response to or as a result of gender-based violence or the threat thereof”⁷⁶ such that interstate commerce is substantially affected. Although the authority for enacting the VAWA rested largely on the “cost of crime” and “national productivity” arguments that were criticized in *Lopez*,⁷⁷ the court reasoned that the Court’s dicta was not determinative of the outcome, as it did not “overturn or limit the rationality test,” which Title III satisfied.⁷⁸

In addition to finding the requisite relationship to interstate commerce, the *Doe* court rejected arguments that Title III violates the Tenth Amendment limitation on the Commerce Clause by impermissibly encroaching on traditional powers of the state or by federalizing state law.⁷⁹ With regard to the former argument, the court stressed that while *Lopez* noted that states have the primary authority to create and enforce criminal law, federal courts across the country have not interpreted this statement to mean that all federal criminal law is unconstitutional.⁸⁰ Furthermore, *Doe* found that Title III does not infringe upon state authority in the area of criminal law enforcement but instead complements it.⁸¹ In response to the claim that Title III unconstitutionally federalizes state criminal and tort law, the court concluded that the civil remedy supplements rather than supplants or alters these areas of state law.⁸² Regarding family law,⁸³ the court noted that the VAWA explicitly

74. *Id.*

75. *Id.* at 614 (stating that the *Lopez* Court had to “pile inference upon inference”) (citations omitted).

76. *Id.* (comparing the cumulative effect of violence against women to the cumulative effect of the home consumption of excess-home grown wheat, the regulation of which was upheld under *Wickard v. Filburn*, 317 U.S. 111, 128 (1942), and concluding that the impact of the former is at least as great as the impact of the latter).

77. See *United States v. Lopez*, 115 S. Ct 1624, 1632 (1995).

78. *Doe*, 929 F. Supp. at 613.

79. *Id.* at 615-16.

80. *Id.* at 615 (citations omitted).

81. *Id.* at 616 (stating that “[t]he Civil Remedy section of VAWA . . . does nothing to infringe on a state’s authority to arrest and prosecute an alleged batterer on applicable criminal charges”).

82. *Id.*

83. Specifically, Title III excludes divorce, alimony, the distribution of marital property, and

excludes such law from Title III's reach.⁸⁴

*Brzonkala v. Virginia Polytechnic and State University*⁸⁵ involved a former student at Virginia Polytechnic Institute who was gang raped in her dormitory.⁸⁶ The *Brzonkala* court analyzed the constitutionality⁸⁷ of Title III under the Commerce Clause⁸⁸ by applying what it determined was a four part test established by *Lopez*. First, the court looked to the "nature of the regulated activity."⁸⁹ The court interpreted the *Lopez* Court as critically distinguishing between the regulation of intrastate activities that are economic

child custody claims. 42 U.S.C. § 13981(e)(4) (1994). Additionally, "[n]othing in VAWA precludes a victim of domestic violence from bringing a tort action in state court for assault and battery or intentional infliction of emotional distress. [Title III] . . . is distinct in remedy and purpose from state tort claims." *Doe*, 929 F. Supp. at 616.

84. *Doe*, 929 F. Supp. at 616 (citing 42 U.S.C. § 13981(e)(4)). The court also held that the means employed by the VAWA for remedying the identified problem is "reasonably adapted to its intended end." *Id.* at 616-17 (citing *Hodel*, 452 U.S. at 276). The court concluded that given the significance of the social problem being targeted, the "previously-approved private attorney general method of remedy," *id.* at 617, and Congress' finding that existing state and federal criminal laws were inadequate to remedy the social ill being targeted, Title III is a reasonable means of implementation. *Id.* at 616.

85. 935 F. Supp. 779 (W.D. Va. 1996).

86. *Id.* at 781-82. For additional description of Ms. Brzonkala's assault, see *Brzonkala* Brief, *supra* note 9, at 1-2. Although Ms. Brzonkala filed a complaint under the school's Sexual Assault Policy, the school's judicial committee found insufficient evidence to take action against one defendant, who denied sexual contact. *Brzonkala*, 935 F. Supp. at 782. The second defendant admitted that he engaged in sexual contact and that the victim had told him "no" twice. *Id.* The committee suspended the second defendant from school for two semesters, a sanction that was reimposed in a second hearing. However, after a second appeal by the defendant, the committee set aside the sanction without warning to Ms. Brzonkala. *Id.* For a discussion and critique of schools' responses to sexual assault, see generally Wagner, *supra* note 49.

87. In addition to the constitutional challenge, the defendants also alleged that the plaintiff had failed to state a claim. *Brzonkala*, 935 F. Supp. at 783-85. The *Brzonkala* court held that the victim had stated a claim under Title III, based on the circumstances of the incident and later occurring events. *Id.* For example, before leaving the victim's room, one of the defendant's said, "You better not have any fucking diseases." *Id.* at 782. Neither defendant used a condom. *Id.* Furthermore, after the incident, one of the defendants announced in the dormitory dining hall that he "like[s] to get girls drunk and fuck the shit out of them." *Id.* After the victim filed the complaint, a friend of one of the defendants told the defendant that he should have "killed the bitch." *Id.* The court concluded that the fact that it was a gang rape, the fact that profoundly disrespectful comments were made regarding the treatment of women and of the plaintiff, and the fact that the defendants mistreated and disparaged the victim with no knowledge of her or her personality, supported a claim that the events were marked at least in part by animus towards the victim's gender. *Id.* at 784-85.

88. Although the court also addressed the constitutionality of Title III under the Fourteenth Amendment and held Title III unconstitutional under that ground as well, this Recent Development focuses only on the Commerce Clause as a source of power to enact Title III. For the court's discussion of the Fourteenth Amendment as a basis for Title III, see *Brzonkala*, 935 F. Supp. at 793-801.

89. *Id.* at 786.

in nature and the regulation of intrastate activities that are noneconomic.⁹⁰ While *Brzonkala* did not assert that the economic or noneconomic nature of the activity is conclusive, the court found that this determination is “a very relevant consideration.”⁹¹ Furthermore, the *Brzonkala* court contended that previous Commerce Clause decisions regarding economic activities cannot control cases, like the one at bar, which involve a noneconomic activity.⁹² Consequently, *Brzonkala* rejected the *Doe* court’s analysis on this point. The court concluded that *Doe* impermissibly relied on a comparison of the noneconomic activities regulated under Title III with economic activities regulated by certain statutes that have been upheld under the Commerce Clause.⁹³ In contrast, the *Brzonkala* court emphasized that the activity being regulated in Title III, like that in *Lopez*, involves local criminal activity which is neither commercial nor economic in nature.⁹⁴

Second, the court determined whether the law contained a jurisdictional element, which guarantees through a case-by-case inquiry that the activity within a given case affected interstate commerce.⁹⁵ Although the court stated that it is unclear if such a requirement is mandated, it concluded that the requirement may be necessary.⁹⁶ Therefore, Title III’s lack of a jurisdictional element was weighed heavily against its constitutionality.⁹⁷

Third, the court dealt with the issue of whether legislative findings, while unnecessary, could support a conclusion that the regulated activity substantially affects interstate commerce, given no such affect was “visible to the naked eye.”⁹⁸ Preliminarily, the *Brzonkala* court stressed that a court conducts an independent analysis of the regulated activity’s impact on

90. *Id.* at 787. (“[The Gun Free School Zones Act] is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms. [The Gun Free School Zones Act] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”) (quoting *United States v. Lopez*, 115 S. Ct. 1624, 1630-31 (1996)).

91. *Brzonkala*, 935 F. Supp. at 787.

92. *Id.* at 787, 791; see also *supra* note 90 and accompanying text.

93. *Brzonkala*, 935 F. Supp. at 791-92.

94. *Id.* at 791.

95. *Id.* at 787 (citing *Lopez*, 115 S. Ct. at 1631).

96. *Id.* at 792.

97. *Id.*

98. *Id.* at 787 (quoting *Lopez*, 115 S. Ct. at 1631-32).

interstate commerce.⁹⁹ After reviewing the legislative history, the court dismissed Congress's findings of a substantial relationship between gender-motivated violence and interstate commerce as insignificantly different from the relationship claimed by the federal government under the Gun Free School Zones Act at issue in *Lopez* and, therefore, as insufficient to bring Title III under the Commerce Clause power.¹⁰⁰

Fourth, the court analyzed the practical implications of holding that Title III is a valid exercise of the Commerce Clause power.¹⁰¹ Concluding that the proximity of violence against women to interstate commerce is not significantly different than that between guns in school zones and interstate commerce,¹⁰² the *Brzonkala* court determined that upholding Title III would, as in *Lopez*, "excessively extend[] Congress's power and . . . inappropriately tip[] the balance away from the states."¹⁰³ While the court recognized that violence against women has a major effect on the national economy, the court noted that a substantial effect on the national economy neither always nor in this case translates into a substantial effect on interstate commerce.¹⁰⁴ According to the court, holding that activities which substantially affect the economy are subject to federal regulation by virtue of the economy's simple

99. *Id.* at 789-90.

100. *Id.* at 791. Although the *Brzonkala* court initially laid out the rational basis test, the court failed to use this language when it determines that gender-motivated violence against women does not substantially affect interstate commerce. The *Lopez* Court made clear that while the Gun Free School Zones Act does not meet the rational basis test, the Court is not narrowing the test. On the contrary, the Court stressed that it was declining to expand further the reach of the Commerce Clause, which it believed upholding the Gun Free School Zones Act would have done. *Lopez*, 115 S. Ct. at 1634. "Admittedly, some of our prior cases have taken long steps down [the] road [toward giving Congress a general police power], giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further." *Id.* (citation omitted); see also Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 811 (1996) ("Thus, the majority at least creates the impression that it is simply maintaining the status quo.").

101. *Brzonkala*, 935 F. Supp. at 788 (citing *Lopez*, 115 S. Ct. at 1632-34).

102. *Id.* at 790-91.

103. *Id.* at 792. The court also stated that "[f]amily law issues and most criminal issues affect the national economy substantially and in turn have some effect on interstate commerce. These too have interstate travel implications. However, to extend Congress's power to these issues would unreasonably tip the balance away from the states." *Id.* at 793. After acknowledging that the VAWA explicitly excludes divorce, alimony, the distribution of property, and child custody from the coverage of Title III, the *Brzonkala* court decided that this fact was "utterly insignificant to the practical implications of accepting the regulated activity as having a substantial effect on interstate commerce." *Id.* For a discussion of this federalism argument against the VAWA, see Easterling, *supra* note 9, at 944-45.

104. *Brzonkala*, 935 F. Supp. at 793.

effect on interstate commerce would permit Congress to regulate “much activity which should be left to state control.”¹⁰⁵ As a result, the court struck down Title III.¹⁰⁶

B. A Critique

A closer look at *Lopez* shows that the holding of the *Doe* court was correct. There are several problems with the *Brzonkala* court’s analysis and these weaknesses are critical to the court’s holding. First, the *Brzonkala* court placed a significant amount of weight on the economic or noneconomic nature of the activity being regulated—here, gender-motivated violence against women.¹⁰⁷ While the *Lopez* Court affirmed that Congress can regulate intrastate economic activity that substantially affects interstate commerce,¹⁰⁸ nowhere did the *Lopez* Court state that the economic or noneconomic nature of the activity is as determinative as the *Brzonkala* court would lead one to believe.¹⁰⁹ *Lopez* simply did not address the regulation of noncommercial activity that substantially affects interstate commerce.¹¹⁰ Decisions by the

105. *Id.* If the VAWA were deemed constitutional, the court would be “hard-pressed to posit any activity by an individual that Congress is without power to regulate” *Id.* (quoting *Lopez*, 115 S. Ct. at 1632).

106. *Id.*

107. *Id.* at 787.

108. *Lopez*, 115 S. Ct. at 1630.

109. *Brzonkala* Brief, *supra* note 9, at 16; Intervenor Brief, *supra* note 9, at 18; Kelly G. Black, *Removing Intrastate Lawsuits: The Affecting-Commerce Arguments After United States v. Lopez*, 1995 B.Y.U. L. REV. 1103, 1124 (1995) (“Identifying an activity as noncommercial, however, does not of necessity foreclose its regulation.”); *see also id.* at 1131 (“Even after *Lopez*, the government could frame an argument for regulation of other subsets of noneconomic activities that in the aggregate have a substantial effect on interstate commerce.”). Also, *Brzonkala* misread *Lopez* when it rejected *Doe*’s interpretation of Title III in light of previous Commerce Clause cases in which the regulated activity might have been more economic in nature. *See Brzonkala*, 935 F. Supp. at 784. The *Lopez* Court did not say that such previous Commerce Clause cases could not be applied to the Gun Free School Zones Act because the regulated activity was noncommercial. Instead, the Court stated that previous Commerce Clause cases could not be used to uphold the Gun Free School Zones Act because the regulated activity had not been established as having the requisite effect on or connection with interstate commerce. *Lopez*, 115 S. Ct. at 1630-31; *see also supra* note 90 and accompanying text.

110. John M. Scott, *Supreme Court Invalidates Federal Gun-Free School Zones Act*, *United States v. Lopez*, 115 S. Ct. 1624, 18 U. ARK. LITTLE ROCK L.J. 513, 530 (1995) (stating that the Court “did not clarify whether it will allow Congress to regulate noncommercial activities to protect interstate commerce”); Symposium, *1996 University of Idaho College of Law Federalism Symposium: III. United States v. Lopez: A Commerce Clause Challenge*, 32 IDAHO L. REV. 505, 510 (1996) (adapted from a presentation given by Adam Hirsh) (stating that the status of noncommercial intrastate activities after *Lopez* is “very unclear”) [hereinafter Hirsh].

At most, *Lopez* implies that noncommercial activities may receive somewhat more rigorous scrutiny. *See Black, supra* note 109, at 1118 (saying that *Lopez*, by analogy with other opinions,

Supreme Court that closely predate¹¹¹ *Lopez* and that have been rendered since *Lopez*,¹¹² however, support the conclusion that intrastate noneconomic activities substantially affecting interstate commerce are still within the reach of the commerce power. These decisions are consistent with the fact that the Court “has never held that Commerce Clause jurisdiction extends only to commercial or economic actors.”¹¹³ On the contrary, it is clear that such

“suggests that activities can be more or less commercial, and the more commercial the activity, the more likely its regulation will be upheld”); Russel F. Pannier, *Lopez and Federalism*, 22 WM. MITCHELL L. REV. 71, 98 (Although “it is doubtful that the Court intended to suggest [that the subject-matter directly regulated must be commercial,] . . . [a] less radical interpretation could take these remarks about ‘commerce’ as stating that regulations of noncommercial matters . . . trigger a heightened degree of judicial scrutiny.”); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 706 (1996) (concluding that the *Lopez* concurrence by Justice Kennedy and joined by Justice O’Connor “indicated that the noneconomic nature of the regulation was crucial to the Court’s rigorous inquiry about effects on interstate commerce”) (citations omitted); cf. *supra* note 109 and accompanying text.

111. See Brickey, *supra* note 100, at 808. Professor Brickey notes that a year before the Supreme Court decided *Lopez*, the Court dealt with a variant of the problem of how the economic or commercial nature of a regulated activity affects its viability under the Commerce Clause in *National Organization for Women, Inc. v. Scheidler. Id.* The defendants in *Scheidler* were “engaged in a pattern of extortion committed through arson, fire bombings, and other criminal acts designed to intimidate abortion clinic employees and women seeking abortions.” *Id.*

To sustain the suit, the plaintiffs had to prove that the protesters conducted the affairs of an enterprise—here, the coalition of anti-abortion groups—through a pattern of extortionate activity.

....

The issue in *NOW* was whether a RICO enterprise must have an economic motive or goal [and the Court concluded that it did not].

....

[A]n enterprise could have a detrimental effect on commerce even though it had no profit-seeking motive or goal.

....

Arguments focusing on the economic motive of the enterprise “overlook[ed] the fact that predicate acts, such as alleged extortion, may not benefit the protesters financially but still may drain money from the economy by harming businesses such as the clinics.”

....

Thus, the only “economic enterprise” with which the protesters had any conceivable connection was the clinics themselves. But they were connected with the clinics only in the sense that they objected to medical procedures the clinics performed. They were noncommercial actors whose activities disrupted commercial enterprises engaged in or affecting interstate commerce.

Id. at 808-11.

112. See Scott, *supra* note 110, at 531. Scott analyzes *United States v. Robertson*, 115 S. Ct. 1732 (1995), in which the Court “upheld the application of the Racketeering Influenced and Corrupt Organization Act (RICO) to a business-related crime occurring primarily within one state” *Id.* Scott concludes that *Robertson* may establish that the Court is not determined to expand *Lopez* and curtail Congress’s commerce power” to include only commercial activities. *Id.*

113. Brickey, *supra* note 100, at 807.

jurisdiction “has been extended to noneconomic activity.”¹¹⁴ And in *Lopez*, the Court explicitly stated that it was maintaining, rather than expanding or contracting, Commerce Clause precedent.¹¹⁵

This reasoning is consistent with the fact that while looking for a “rational basis”¹¹⁶ for concluding that gun possession near schools “substantially affects”¹¹⁷ interstate commerce, the Court warned not against the regulation of noneconomic activity but rather against the regulation of any activity whose effects upon interstate commerce are “so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local.”¹¹⁸ The Court explicitly reaffirmed that as long as the effect is substantial, activities that only indirectly¹¹⁹ or cumulatively¹²⁰ affect interstate commerce are within

114. *Id.* (noting possession of a firearm has been determined to affect[] commerce”) (citing *Scarborough v. United States*, 431 U.S. 563, 571-75 (1977)); see also Pannier, *supra* note 110, at 72-73 (saying that “commerce includes . . . cattle walking back and forth in pastures [and] carrying liquor for personal use in one’s own vehicle. . . . The sample suggests a generalization. ‘Commerce’ includes any activity, process, event or state of affairs—human or nonhuman, commercial or noncommercial.”); Frickey, *supra* note 110, at 712 (“The cases upholding the constitutionality of the Civil Rights Act of 1964 indicated that Congress no longer even needed an economic motivation to exercise its commerce power.”).

115. See *supra* note 100; see also Brickey, *supra* note 100, at 811 (“[I]f [*Lopez* maintains Commerce Clause analysis], one can only conclude that . . . noncommercial activity that adversely affects an economic enterprise engaged in commerce is subject to Commerce Clause jurisdiction.”).

[T]here are at least two reasons why [the interpretation that the word ‘commerce’ is restricted to commercial activities] cannot stand. First, the Court did not explicitly say so. One would naturally expect it to announce such a dramatic change in the law it had thought of itself as making it. Second, it did explicitly reaffirm the principle that Congress can directly regulate interstate commerce in any way it wishes, for any reason it chooses.

Pannier, *supra* note 110, at 96. (footnotes omitted).

116. *United States v. Lopez*, 115 S. Ct. 1624, 1629 (1995) (citations omitted).

117. *Id.* at 1630 (“Case law has not been clear whether an activity must ‘affect’ or ‘substantially affect’ interstate commerce [but] consistent with the great weight of . . . case law, . . . the proper test . . . [is] whether the regulated activity ‘substantially affects’ interstate commerce.”) (citations omitted).

118. *Id.* at 1628-29 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)); cf. Hirsh, *supra* note 110, at 510 (“[C]ommercial and noncommercial activities [may not] always be equal. . . . At some point . . . the noncommercial activity becomes too attenuated. . . . Like many other things, it is a matter of degree.”).

119. *Id.* at 1628 (reviewing *Jones & Laughlin Steel*, 301 U.S. 1; *United States v. Darby*, 312 U.S. 110 (1941); and *Wickard v. Filburn*, 317 U.S. 111 (1942)). The Court discussed the development of Commerce Clause jurisprudence and the clear and consistent rejection of the distinction between direct and indirect effects. *Id.*

120. *Id.* (emphasizing that although the individual activity at issue in a case may be “trivial by itself, that was not ‘enough to remove [it] from the scope of federal regulation where . . . [the activity], taken together with that of many others similarly situated, is far from trivial””) (quoting *Wickard*, 317 U.S. at 127-28). See also *Lopez*, 115 S. Ct. at 1629 (“The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimus* character of individual

Congress's power to regulate under the Commerce Clause. Quoting *Wickard v. Filburn*,¹²¹ the Court stated that "even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."¹²² This interpretation of *Lopez* is further supported by several federal circuits that have heard Commerce Clause challenges to statutes since *Lopez* and have not required that the regulated activity be economic in nature.¹²³

Second, the *Brzonkala* court erroneously concluded that *Lopez* appears to require a jurisdictional element, which ensures through case-by-case inquiry that the activity being regulated affects interstate commerce.¹²⁴ Although the *Lopez* Court did discuss this element,¹²⁵ it only turned to this element as an alternative way to save the statute because the Court had already determined that gun possession as a class of activity was insufficiently connected to interstate commerce.¹²⁶ In other words, if a class of activity does not substantially affect commerce, Congress can regulate the individual instances of that activity that are shown to have such an effect.¹²⁷ This interpretation has

instances arising under that statute is of no consequence") (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968)).

121. 317 U.S. 111 (1942).

122. *Lopez*, 115 S. Ct. at 1628 (quoting *Wickard*, 317 U.S. at 125).

123. *Brzonkala* Brief, *supra* note 9, at 16 (stating that courts "have upheld both statutes that contain no jurisdictional element requiring a particular connection between individual violations and interstate commerce, as well as statutes that regulate non-commercial conduct") (citing *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996) (Child Support Recovery Act); *United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996) (conspiracy to distribute controlled substance); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995) (Freedom of Access to Clinic Entrance Act); *United States v. Leshuk*, 65 F.3d 1105, 1111-1112 (4th Cir. 1995) (possession and manufacture of marijuana); *United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994) (upholding a federal arson statute as applied to a private residence), *cert. denied*, 115 S. Ct. 1838 (1995); and *United States v. Moore*, No. 93-5273, 93-5274, 93-5281, 1994 U.S. App. LEXIS 14314, at *19-*20 (4th Cir. June 10, 1994) (same).

124. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 779, 787 (W.D. Va. 1996).

125. *Lopez*, 115 S. Ct. at 1631.

126. *Id.* at 1631 (citing with approval *United States v. Bass*, 404 U.S. 336 (1971)). *Bass* held that although mere possession of a firearm may not be subject to Commerce Clause power, the statute, which made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm" was constitutional. *Bass*, 404 U.S. at 337. The *Lopez* Court then stated that "[u]nlike the statute in *Bass*, the [Gun Free School Zones Act] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 115 S. Ct. at 1631; see also Black, *supra* note 109, at 1130 ("Still another route to regulation of economic activity is to require the satisfaction of a jurisdictional element.") (emphasis added).

127. See Brickey, *supra* note 100, at 823 ("If the class of activities as a whole affects commerce,

also been supported by several circuits that have upheld statutes without a jurisdictional requirement.¹²⁸

Third, although the *Brzonkala* court correctly stated¹²⁹ that a court's "rational basis" determination may be informed by legislative findings but is independent of them,¹³⁰ the court erred in holding that no rational basis exists for concluding that gender-motivated violent crimes substantially affect interstate commerce. This conclusion is supported by a brief review of other Commerce Clause cases that the *Lopez* majority discussed with approval. For example, in *Maryland v. Wirtz*,¹³¹ the Court upheld the application of the Fair Labor Standards Act, which regulates hours and wages, to employees of schools and hospitals even though these institutions did not ship goods or compete in interstate commerce.¹³² The Court reasoned that poor working conditions might cause labor unrest that could "interrupt and burden [the] flow of goods across state lines."¹³³ Similarly, in *Perez v. United States*,¹³⁴ the Court upheld the Consumer Credit Protection Act, which outlawed extortionate credit transactions (i.e. loansharking).¹³⁵ The Court reasoned that Congress could have believed that loan sharking affects interstate commerce because it supports organized crime which "extracts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate business."¹³⁶ In *Katzenbach*¹³⁷ and its companion case, *Heart of Atlanta Motel*,¹³⁸ the Court

then an individual instance of the activity need not be shown to do so. In consequence, the finding serves as a proxy for an express jurisdictional element.") (citations omitted); Black, *supra* note 109, at 1130 ("Where an activity does not *as a class* come within Congress's constitutional authority, Congress can nevertheless regulate *individual instances* of that activity that do come within its power by including a jurisdictional element in the statute.").

128. See *supra* note 123 and accompanying text.

129. *Brzonkala*, 935 F. Supp. at 789-90.

130. *Lopez*, 115 S. Ct. at 1631-32. While the Court makes an "independent evaluation" and Congress "normally is not required to make formal findings as to the substantial burdens" on interstate commerce, such findings "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Id.*; see also *id.* at 1129 n.2 ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring))).

131. 392 U.S. 183 (1968).

132. *Id.* at 201.

133. *Id.* at 195.

134. 402 U.S. 146 (1971).

135. *Id.* at 147.

136. *Id.* at 156.

137. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

upheld the 1964 Civil Rights Act as applied to restaurants which received a substantial amount of food that at some time had moved in commerce¹³⁹ and to public accommodations which provided lodging to “transient guests,” respectively.¹⁴⁰ In reasoning that generally applies to both cases, the *Katzenbach* Court explained that the congressional findings provided a sufficient basis for concluding that such establishments sold fewer “interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new business refrained from establishing” themselves as a result of it.¹⁴¹ All of these cases employed “substantial effects” language.¹⁴²

Given this framework, there is a rational basis for concluding that gender-based violent crimes cumulatively have a substantial effect on interstate commerce. Unlike in *Lopez*, one does not have to “pile inference upon inference”¹⁴³ in order to see the relationship between gender-motivated

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

139. *Katzenbach*, 379 U.S. at 305. The district court held that the restaurant’s 46% of food that had at one point moved in commerce satisfied the substantial portion test. *Id.* at 296-97.

140. *Heart of Atlanta Motel*, 379 U.S. at 247, 252.

141. *Katzenbach*, 379 U.S. at 300.

142. *Maryland v. Wirtz*, 392 U.S. 183, 189, 196 n.27 (1968); *Perez v. United States*, 402 U.S. 146, 152 (1971); *Katzenbach*, 379 U.S. at 302; *Heart of Atlanta Motel*, 379 U.S. at 250, 252, 255, 258. For a discussion about the ambiguity regarding whether the Court has adopted an “effects” test or a “substantial effects” test in different Commerce Clause cases, see *United States v. Lopez*, 115 S. Ct. 1629, 1629-31 (1995); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 727-33 (1996); and Scott, *supra* note 110, at 519, 525-26. See also *EEOC v. Wyoming*, 460 U.S. 226 (1983). *EEOC v. Wyoming* upheld the constitutionality of the Age Discrimination in Employment Act as applied to game wardens. *Id.* at 234, 243. The case could also be used to buttress the constitutionality of Title III. The regulated activity was discrimination against employees over 40. *Id.* at 232. This activity was considered to exert significant influence on businesses, which would thereby exert substantial influence over interstate commerce. *Id.* at 241. Although Justice Rehnquist, the author of the majority opinion in *Lopez*, dissented in *EEOC v. Wyoming*, his disagreement was not over whether the discrimination could be reached under the Commerce Clause power but rather over whether the Tenth Amendment limitation on the Commerce Clause was implicated. *Id.* at 252. The reasons he cited for the ADEA’s failure to pass the Tenth Amendment test are inapplicable to Title III. *Id.* at 251-65.

In *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, the Court upheld Congress’s regulation of intrastate surface mining operations because Congress found that the mining adversely affected commerce by, among other means, “diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes,” by “impairing natural beauty,” and by “degrading the quality of life in local communities.” 452 U.S. 264, 277 (1981) (quoting 30 U.S.C. § 1201(c) (1994)). The Court found not just a rational basis but rather “ample support” for these findings. *Id.* Justice Rehnquist concurred in the judgment and wrote separately only to clarify that the statute was upheld because the regulated activity “substantially” affected, as opposed to just “affected,” interstate commerce. *Id.* at 312-13 (Rehnquist, J., concurring).

143. *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995).

violent crimes against women and interstate commerce. In *Lopez*, the government argued that the presence of guns near schools affected the learning environment, which in turn hampered the educational process, which thereby created a less productive citizenry, which in turn adversely affected the economy, which then substantially affected interstate commerce.¹⁴⁴ While the *Brzonkala* court accurately asserted that the substantial effects of gender-based violence are realized in the economy before exerting force on interstate commerce,¹⁴⁵ *Lopez* clearly accepted an indirect effect on interstate commerce.¹⁴⁶ And, contrary to the *Brzonkala* court's conclusion,¹⁴⁷ the congressional findings¹⁴⁸ demonstrate a rational basis for concluding that this substantial effect on the economy has a substantial effect on interstate commerce. Although the absence of such findings in *Lopez* was allegedly not independently fatal to the statute in that case,¹⁴⁹ the legislative history of Title III provides the information and link that the *Lopez* Court needed and was lacking.¹⁵⁰

144. *Id.* at 1632. The Government also argued that the medical costs associated with crime and people's unwillingness to travel constituted a substantial effect on interstate commerce. *Id.*

145. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 779, 792-93 (W.D. Va. 1996).

146. *Lopez*, 115 S. Ct. at 1628.

147. *Brzonkala*, 935 F. Supp. at 790-91.

148. *See supra* notes 26-45 and accompanying text.

149. *Lopez*, 115 S. Ct. at 1631-32.

We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

Id. (citations omitted). *But see* Graglia, *supra* note 142, at 767 (stating that the Court invalidated the statute because of the absence of legislative findings).

150. *See United States v. Lopez*, 2 F.3d 1342, 1363-64 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

Where Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer 'if there is any rational basis for' the finding. Practically speaking, such findings almost always end the matter. [However,] [c]ourts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding.

Id.

Insofar as the question [of whether a particular activity substantially affects interstate commerce] is one of magnitude (an empirical question), the Court is in no position to contradict a (presumed) congressional determination of the substantiality of the effect. It is difficult for the Court to contradict Congress's definition of substantiality when it has no alternative definition of its own. . . .

The Constitution, it is true, has been interpreted to permit judicial overriding of congressional

Finally, the *Brzonkala* court erred in concluding that the practical implications of holding Title III constitutional mirrored those that the *Lopez* Court feared would result if it upheld the Gun Free School Zones Act.¹⁵¹ First, when analyzing the Tenth Amendment limitation on the Commerce Clause, the *Lopez* Court did reject the government's "cost of crime"¹⁵² and "national productivity"¹⁵³ arguments. The Court did not, however, say that these justifications were inherently flawed. On the contrary, *Perez v. United States*,¹⁵⁴ cited with approval by the *Lopez* Court, is one of several cases that demonstrates that the "cost of crime" reasoning may serve as a rational basis for finding a substantial effect on interstate commerce.¹⁵⁵ Similarly, *Katzenbach* and *Heart of Atlanta Motel* rested on a theory of the "cost of discrimination,"¹⁵⁶ yet the *Lopez* Court cited these cases approvingly because of the substantial effects on interstate commerce found in them.¹⁵⁷

What the *Lopez* Court did clearly hold was not that these bases are categorically excluded as justifications for invoking the Commerce Clause

determinations, but only, presumably, when the Constitution provides a judicially enforceable rule of law. The Commerce Clause does not provide such a rule, even with the aid of the Tenth Amendment.

Graglia, *supra* note 142, at 769.

[T]he Court may give Congress more leeway to regulate noncommercial activities such as intrastate litigation if Congress makes strong, factually grounded findings connecting the activities with interstate commerce . . . Reading the opinions together, it appears that findings would likely make a difference to a majority of the Court only in cases involving activities with nonobvious effects on interstate commerce, effects which, once established, can be shown to be substantial.

Black, *supra* note 109, at 1132-33; *see also* Frickey, *supra* note 110, at 707 (concluding that the *Lopez* Court considered the lack of findings to "negate one source of potential support for the proposition that the statute had a rational connection to interstate commerce" and that "the Court did not clearly repudiate the proposition that formal findings might have tipped the scales in the case") (citations omitted); *Id.* at 712 ("[T]he Supreme Court in *Perez* signaled that the presence of formal congressional findings should lead to extraordinary judicial deference in assessing the constitutionality of legislation."). *But see* Scott, *supra* note 110, at 531 (concluding that "*Lopez* may demonstrate that the determination of what is 'commercial' is within the hands of the Court, not Congress").

151. *Brzonkala*, 935 F. Supp. at 793.

152. *Lopez*, 115 S. Ct. at 1632 (The government argued that violent crime costs, through insurance, are spread throughout the population.).

153. *Id.* at 1632.

154. 402 U.S. 146 (1971).

155. *Id.* at 154-56; *see also* *United States v. Robertson*, 115 S. Ct. 1732 (1995) (per curiam) (upholding RICO as applied to an Arizona resident who used drug money to obtain and operate a gold mine in Alaska); *Russell v. United States*, 471 U.S. 858 (1985) (upholding an arson statute as applied to a defendant who burned a privately-owned apartment building); *Scarborough v. United States*, 431 U.S. 563 (1977) (upholding a statute prohibiting convicted felons from possessing firearms).

156. *See Katzenbach v. McClung*, 379 U.S. 294, 298-99 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964).

157. *Lopez*, 115 S. Ct. at 1629-30.

power but rather that they were insufficiently established in *Lopez* to satisfy the necessary connection with interstate commerce. To accept these arguments in the context of the Gun Free School Zones case, in which no substantial effect on interstate commerce was found, would allow Congress to regulate “not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.”¹⁵⁸ As reaffirmed by *Lopez*, the rationality based substantial effects test, not the label of the association, is what determines whether or not an activity may be regulated by Congress.¹⁵⁹ *Lopez* supports this interpretation through its discussion of *Wirtz*.¹⁶⁰ The Court first quoted Justice Douglas’ dissent in *Wirtz*, which warned that the majority decision might permit regulation of “[a]ll activities affecting commerce, even in the minutest degree.”¹⁶¹ The *Lopez* Court then responded that “[n]either here nor in [other precedents] has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities,”¹⁶² but that the regulation of activities substantially affecting

158. *Id.* at 1632. Likewise, accepting the national productivity argument *in this context*, due to the very attenuated relationship between gun possession and interstate commerce, would permit any activity that affected economic productivity to be regulated by Congress. *Id.*; *see also* Brickey, *supra* note 100, at 829 (stating that “the Court made clear its position that . . . Congress cannot regulate *all* activity that is related to productivity”) (emphasis added); Black, *supra* note 109, at 1131-32 (“Indeed, the decision in *Lopez* could be seen as applying only where the relationship to commerce is weak in similarity . . . effect, and proximity.”).

159. *See supra* note 109 and accompanying text.

160. *Lopez*, 115 S. Ct. at 1629.

161. *Id.* at 1629 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 204 (1968) (Douglas, J., dissenting)).

162. *Lopez*, 115 S. Ct. at 1629 (quoting *Wirtz*, 392 U.S. at 197 n.27). Similarly, in *Perez*, which the *Lopez* Court cites approvingly, the dissent criticizes the majority’s decision upholding the regulation of loansharking by claiming that

it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Perez v. United States, 402 U.S. 146, 157-58 (1971) (Stewart J., dissenting). Nevertheless, the majority states:

We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. . . . We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

Id. at 156-57.

interstate commerce does not violate this principle.¹⁶³ For the same reason, the *Perez* Court also dismissed the dissent's warning that upholding the regulation of loansharking permitted the federalization of nearly all crime,¹⁶⁴ which could be said to satisfy the "affecting business" rationale employed by the majority.¹⁶⁵ The multiplicity and strength of the effects of gender-motivated violence on interstate commerce¹⁶⁶ are much greater than those resulting from gun possession in school zones¹⁶⁷ and it is this difference that proves critical.

Second, the *Lopez* Court did demonstrate concern about the Gun Free School Zones Act's intrusion upon state authority in the criminal and educational spheres.¹⁶⁸ Nevertheless, the *Brzonkala* court misevaluated the significance of the concern¹⁶⁹ and the impact that Title III has on state law. *Lopez* did not hold that federal criminal law unconstitutionally infringes on state powers. In contrast, *Perez*¹⁷⁰ and similar cases¹⁷¹ show definitively that criminal law is still an acceptable area for federal regulation. *Lopez* did conclude, however, that the Gun Free School Zones Act in particular "inappropriately overr[ode] legitimate state firearms laws with a new and unnecessary Federal law."¹⁷² In contrast, Title III fills a gap left by the states and does not infringe upon state criminal law.¹⁷³

163. *Lopez*, 115 S. Ct. at 1629-30. The other two categories of activity that congress may regulate under its Commerce Clause power are "the use of channels of interstate commerce" and "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* at 1629.

164. *Perez*, 402 U.S. at 157-58 (Stewart, J., dissenting).

165. *Id.*

166. See *supra* notes 38-45 and accompanying text.

167. *Lopez*, 115 S. Ct. at 1632.

168. *Id.* at 1632 ("[I]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states historically have been sovereign.").

169. See Pannier, *supra* note 110, at 99-100 ("A more plausible . . . interpretation would construe the Court's statements [about the states possessing primary authority for criminal law and about not allowing the Commerce Clause to be expanded so as to be applicable to family law] as merely indicating that regulations of subject matters traditionally regulated by the states trigger some kind of heightened judicial scrutiny. If this is the result intended by the Court, then no significant limitation upon Congressional power has been effected.").

170. *Perez*, 402 U.S. at 156-57.

171. See *supra* note 156 and accompanying text.

172. *Lopez*, 115 S. Ct. at 1631 n.3 (citation omitted).

173. See *supra* notes 46-52, 82 and accompanying text; see also Frazee, *supra* note 9, at 251-56 (listing twelve ways in which a civil rights remedy provides what state law does not).

Criminal statutes, even hate crime statutes, are not an adequate substitute for civil rights legislation though they can function well in conjunction with each other. Victims do not have control over [any of these] prosecutions . . . When gender is included in hate crime laws, they may not help

IV. CONCLUSION

Look back at the stories described at the beginning of this article. These reports are disturbing, but not surprising. Although the acts that spurred each of these reports may not, by themselves, substantially affect interstate commerce, the thousands upon thousands of such acts perpetrated across the country do. Furthermore, granting a civil rights remedy to the victims of such crimes neither encroaches upon nor alters local remedies. The federal government has traditionally held a substantial role in guaranteeing individuals protection from bias-motivated violence; Title III simply aims to grant this basic civil right to victims of gender-motivated violence as well.¹⁷⁴

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victims of gender-motivated violence because judges and juries embody [discriminatory attitudes that work against such victims]. Also, the wide variation of available remedies among states argues for the necessity of a federal civil rights remedy. State laws cannot create a national standard of anti-discrimination or equality. More importantly, biases in state laws, as well as the administration of justice which deny equal rights to women, create a compelling reason for a federal remedy.

Id. at 196; Pannier, *supra* note 110, at 92 (“When Congress criminalizes conduct *already denounced as criminal by the States*, it effects a change in the sensitive relation between federal and state criminal jurisdiction.”) (citations omitted) (emphasis added); Willis, *supra* note 9, at 2202 (noting that Title III “hope[s] to provide new remedies *not presently available* to rape victims through state court actions”) (emphasis added). Unlike the Gun-Free School Zones Act, Title III is not “part of a burgeoning body of federal criminal law, much of which overlaps with or merely duplicates state crimes.” Brickey, *supra* note 100, at 839. Furthermore, Title III limits the provision’s coverage to areas of civil rights and explicitly refuses to trespass on state law in areas of divorce, alimony, equitable distribution of marital property, or child custody. 42 U.S.C.A. § 13981(e)(4) (1995). The *Brzonkala* court erroneously disregarded as insignificant this limitation on Title III’s reach. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 935 F. Supp. 779, 793 (W.D. Va. 1996).

174. See *Developments*, *supra* note 16, at 1547; Frazee, *supra* note 9, at 255 (stating that federal remedies “have proven necessary and effective in the past when local jurisdictions were either unwilling or unable to protect the rights of their citizens”).

