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CASENOTES

COMMERCE CLAUSE, ENFORCEMENT CLAUSE, OR NEITHER? THE CONSTITUTIONALITY OF THE VIOLENCE AGAINST WOMEN ACT IN *BRZONKALA V. MORRISON*

I. INTRODUCTION

On September 21, 1994, two men raped Christy Brzonkala in her dormitory room at Virginia Polytechnic Institute and State University ("Virginia Tech").[1] Unfortunately, this kind of event is not a rare occurrence in the United States. "According to the U.S. Department of Justice Bureau of Justice Statistics ("BJS"), women are the victims of more than 4.5 million violent crimes each year. This alarming figure includes approximately 500,000 rapes or other sexual assaults."[2] In light of these statistics, and "after four years of hearings, Congress enacted [the Violence Against Women Act of 1994 ("VAWA" or "the Act")], a comprehensive federal statute designed to address 'the escalating problem of violent crime against women.'"[3] Title III of the VAWA establishes a federal substantive right that all persons within the United States shall have the right to be free from crimes of gender-motivated violence.[4] To enforce this right, the Act creates a private cause of action against any person committing a gender-motivated crime and allows compensatory

1. *See* Danielle M. Houck, *VAWA after* Lopez: *Reconsidering Congressional Power under the Fourteenth Amendment in Light of* Brzonkala v. Virginia Polytechnic Institute and State University, 31 U.C. DAVIS L. REV. 625, 626 (1998).
2. MARGARET C. JASPER, THE LAW OF VIOLENCE AGAINST WOMEN 1 (1998).
3. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 962-63 (4th Cir. 1997), *rev'd en banc*, 169 F.3d 820 (4th Cir. 1999) (quoting S. REP. NO. 103-138, at 37 (1993)).
4. *See* Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. § 13981(b) (1994)).

damages, punitive damages, injunctive, declaratory, or any other appropriate relief.[5]

Brzonkala, one of the first women to sue under the VAWA in federal court, left school due to her dissatisfaction with Virginia Tech's response to her rape and because she feared her rapists, both football players at Virginia Tech.[6] However, on March 5, 1999, the U.S. Court of Appeals for the Fourth Circuit held that section 13981 was an unconstitutional exercise of power to regulate interstate commerce because it "neither regulates an economic activity nor contains a jurisdictional element."[7]

The U.S. Supreme Court granted a writ of certiorari[8] and oral argument before the Supreme Court took place on January 11, 2000.[9] The "Virginia Tech case" has been watched closely by citizens of the Commonwealth of Virginia and across the nation. Nobody denies the shocking statistics of gender-motivated violence sweeping our nation. The essential question remains, however, whether Congress may intrude into areas that are traditionally of state concern and constitutionally create a private right of action for victims of gender-motivated violence.

Part II of this casenote examines the history of Commerce Clause jurisprudence and lays the foundation on which the Fourth Circuit analyzed this case. Part III documents the Fourth Circuit's opinion in *Brzonkala*, including Judge Motz's dissent. Part IV analyzes the Fourth Circuit's opinion, including an examination of other federal court holdings on the issue. Part V forecasts the Supreme Court's analysis of this issue. Finally, Part VI concludes by discussing the implications of the Fourth Circuit's reasoning on future Commerce Clause jurisprudence and the need for a precise analysis of current Commerce Clause authority by the Supreme Court.

II. HISTORY OF COMMERCE CLAUSE JURISPRUDENCE

The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and

5. *See id.* § 13981(c).
6. *See Brzonkala*, 132 F.3d at 953-56.
7. *Brzonkala*, 169 F.3d at 833.
8. *See* Brzonkala v. Morrison, 120 S. Ct. 11 (Sept. 28, 1999) (Nos. 99-5, 99-29).
9. For a transcript of the oral argument, see *Brzonkala v. Morrison*, Nos. 99-5, 99-29, 2000 WL 41232 (Jan. 11, 2000).

with the Indian Tribes."[10] The Supreme Court has changed its interpretation of this clause many times since it was written. Chief Justice Marshall offered the venerable first definition of Congress's commerce power in *Gibbons v. Ogden*:[11]

> Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.... [The commerce power] is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.[12]

Early cases concerning the Commerce Clause were more involved with limiting state actions than restricting acts of Congress.[13] However, after Congress enacted the Interstate Commerce Act in 1887[14] and the Sherman Antitrust Act in 1890,[15] a new era of federal regulation under the Commerce Clause power began.[16] The Supreme Court reasoned that while areas of interstate commerce were reserved for regulation by the federal government, "Congress could not regulate activities such as 'production,' 'manufacturing,' and 'mining.'"[17] Yet, the Court stated that if the interstate and intrastate aspects of commerce were so entwined that the regulation of one necessitated control of the other, Congress, and not the states, was entitled to prescribe the final rule.[18]

In the early 1930s, the Supreme Court used the direct/indirect test. This test distinguished between activities that directly affected interstate commerce and those that indirectly affected interstate commerce,[19] Congress's regulatory power extended only to those

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10. U.S. CONST. art. I, § 8, cl. 3.
11. 22 U.S. (9 Wheat.) 1 (1824).
12. *Id.* at 189-190, 196.
13. *See, e.g.*, Veazie v. Moor, 55 U.S. (14 How.) 568 (1852); Kidd v. Pearson, 128 U.S. 1 (1888).
14. Ch. 104, 24 Stat. 379 (1887).
15. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1994)).
16. *See* United States v. Lopez, 514 U.S. 549, 554 (1995).
17. *Id.*
18. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA (2d ed. 1995); *see, e.g.*, Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351-52 (1914) (collectively known as the *Shreveport Rate Cases*).
19. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542-50 (1935).

activities that directly affected commerce.[20] The direct/indirect distinction lasted only a short while.[21]

NLRB v. Jones & Laughlin Steel Corp.,[22] *United States v. Darby*,[23] and *Wickard v. Filburn*[24] began a new "era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause."[25] In *Jones & Laughlin Steel Corp.*, the Court departed from the direct/indirect analysis and held "that intrastate activities that 'have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions' are within Congress'[s] power to regulate."[26] In *Darby*, the Court extended the Commerce Clause power to those intrastate activities "which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[27] Finally, in *Wickard*, which has been called "the most far reaching example of Commerce Clause authority over intrastate activity,"[28] the Supreme Court held that the Agricultural Adjustment Act of 1938[29] could constitutionally be applied to the production and consumption of wheat grown by a farmer for his own family.[30] The Court, in *Wickard*, reasoned that even though the activity may be local, intrastate, and not regarded as commerce, if it has a substantial effect on interstate commerce, regardless of whether this effect is direct or indirect, then Congress may constitutionally regulate it.[31] While greatly expanding Commerce Clause authority, the Court continued to warn that the scope of interstate commerce power should not extend to such an indirect and remote effect on interstate

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20. *See id.*
21. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37-41 (1937) (holding the new test to be one of degree). *Jones & Laughlin Steel Corp.* was decided only two years after *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495 (1935).
22. 301 U.S. 1 (1937).
23. 312 U.S. 100 (1941).
24. 317 U.S. 111 (1942).
25. United States v. Lopez, 514 U.S. 549, 556 (1995).
26. *Id.* at 555 (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. at 36-38).
27. *Darby*, 312 U.S. at 118.
28. *Lopez*, 514 U.S. at 560.
29. Ch. 30, 52 Stat. 31 (1938) (codified as amended at 7 U.S.C. §§ 1281-93, 1340 (1994 & Supp. III 1997)).
30. *See* Wickard v. Filburn, 317 U.S. 111, 128-29 (1942).
31. *See id.* at 125.

commerce that it would destroy our dual-government system.[32] Since then, the Court has used a rational basis test to determine whether an activity sufficiently affects interstate commerce so as to warrant regulation without violating the constitutional division of power.[33]

This interpretation of the Commerce Clause expanded the power of Congress to regulate a myriad of activities. In addition, the Court held in the *Civil Rights Cases*[34] that section 5 of the Fourteenth Amendment does not grant Congress the power to enact laws directed towards the actions of private individuals, but only to enact laws directed at state action.[35] The Court's expansive interpretation of the Commerce Clause, however, afforded Congress an alternative power to address civil liberties. For example, in *Katzenbach v. McClung*,[36] the Court upheld the Civil Rights Act of 1964[37] as it applied to a local restaurant.[38] The Court reasoned that this activity was within Congress's Commerce Clause power merely because the restaurant, Ollie's Barbecue, bought food that had moved in commerce.[39] So long as the Court can find that Congress had a rational basis for determining that the activity sufficiently affected interstate commerce so as to be regulated, the Court will allow the regulation. In addition, the Court has stated that so long as the general regulatory statute has a substantial effect on interstate commerce, even *de minimis* individual instances that fall under the statute may be included in the regulation.[40]

32. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).
33. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that whether an activity sufficiently affects interstate commerce so as to fall under the Commerce Clause power is a judicial rather than a legislative question); Katzenbach v. McClung, 379 U.S. 294 (1964).
34. 109 U.S. 3 (1883).
35. *See id.* at 11.
36. 379 U.S. 294 (1964).
37. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a(a)-(c) (1994)).
38. *See Katzenbach*, 379 U.S. at 302 (holding that within the purview of the Commerce Clause is the power to affect activities that "directly or indirectly burden or obstruct interstate commerce"); *see also Heart of Atlanta Motel*, 379 U.S. at 258 (holding that the Civil Rights Act may be applied to a motel under the Commerce Clause power because racial discrimination has an effect on interstate commerce).
39. *See Katzenbach*, 379 U.S. at 303-05.
40. *See* Maryland v. Wirtz, 392 U.S. 183, 192-93 (1968).

The Supreme Court's 1995 decision in *United States v. Lopez*[41] narrowed the scope of Congress's Commerce Clause power.[42] For the first time in sixty years, the Court struck down an act of Congress because it violated the Commerce Clause.[43] Because the Court followed a heightened level of scrutiny and overturned the Gun-Free School Zones Act of 1990,[44] *Lopez* has been criticized as sending a mixed message, and its significance remains unclear.[45] Based on its authority to regulate interstate commerce, Congress passed the Gun-Free School Zones Act, making it a federal offense to possess a firearm within a school zone.[46] The Court reasoned that there are three categories of activity that Congress may regulate under its Commerce Clause power: (1) use of channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities with a substantial relation to interstate commerce.[47] The Court quickly determined that the Act did not fall under either of the first two categories and focused its reasoning on the third category.[48] In its analysis, the Court looked to the fact that section 922(q) is not a part of a larger regulation of an economic activity and that section 922(q) did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[49]

This portion of the Court's holding has created much confusion. Many interpret the Court's meaning as requiring either that the activity being regulated be economic in nature, or that the statute have a jurisdictional element in order to prove the activity substantially affects interstate commerce.[50] However, the Court does not

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41. 514 U.S. 549 (1995).

42. *See id.* at 561 (holding that Congress had offended the Commerce Clause in reaching an activity that had a tenuous connection with interstate commerce).

43. *See* Mark Hansen, *Crossing the State Line? Violence Against Women Act Battered in Test of Congressional Powers under Commerce Clause*, A.B.A. J., May 1999, at 28.

44. Pub. Law No. 101-647, 104 Stat. 4844 (codified as amended at 18 U.S.C. § 922(q)(1)(A)-(4) (1994 & Supp. IV 1998)).

45. *See* Houck, *supra* note 1, at 636-37.

46. *See* Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C.A. §§ 2000a(a)-(c) (1994)).

47. *See Lopez*, 514 U.S. at 558-59.

48. *See id.* at 561-62.

49. *Id.* at 561.

50. *See, e.g.*, Margaret A. Cain, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 401-03 (1999); Sara E. Kropf, *The Failure of* United States v. Lopez: *Analyzing the Violence Against Women Act*, 8 S. CAL. REV. L.& WOMEN'S STUD. 373, 395-97 (1999); Judi L. Lemos, *The Violence Against Women Act of 1994: Connecting Gender Motivated Violence to Interstate Commerce*, 21 SEATTLE U.L. REV. 1251,

expressly state that these two factors are requirements. Instead, the Court simply used these two factors in the *Lopez* case to draw its conclusion that the presence of guns in schools does not substantially affect interstate commerce.[51] The Court also considered the fact that congressional findings were absent.[52]

Scholars have disagreed as to the impact *Lopez* will have on Commerce Clause precedent.[53] Some language may indicate that the Supreme Court is changing its view of the Commerce Clause, but without further cases to substantiate the change, federal courts are hesitant to overturn acts of Congress under *Lopez* alone.[54] However, since *Lopez*, the Supreme Court has denied certiorari in every case dealing with the Commerce Clause until now.[55]

III. *BRZONKALA V. VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY*[56]

A. *Facts and Procedural History*

Christy Brzonkala brought an action under section 13981 of the VAWA in federal district court against defendants Morrison and Crawford alleging that the two forcibly raped her in her dormitory room at Virginia Tech.[57] Brzonkala alleged that the rape, coupled with Morrison's comments: "You better not have any f* * *ing diseases"[58] and "I like to get girls drunk and f* * * the s* * * out of them"[59] violated her right under section 13981 to be free from gender-motivated crimes of violence.[60] The defendants moved to dismiss for failure to state a claim and, in the alternative, if the complaint did state a claim, because Congress did not have constitutional authority to pass section 13981.[61] The government joined Brzonkala and defended the section as a constitutional exercise of

1255-58 (1998).

51. *See* sources cited *supra* note 50.
52. *See Lopez* at 562-63.
53. *Cf.* Houck, *supra* note 1; Kropf, *supra* note 50; Antony Barone Kolenc, Note, *Commerce Clause Challenges after* United States v. Lopez, 50 FLA. L. REV. 867, 931 (1998).
54. *See Lopez*, 514 U.S. at 931.
55. *See* Hansen, *supra* note 43, at 28.
56. 169 F.3d 820 (4th Cir. 1999).
57. *See id.* at 827.
58. *Id.*
59. *Id.*
60. *See id.*
61. *See id.*

Congress's power to regulate interstate commerce and alternatively, as a constitutional exercise of Congress's power under section 5 of the Fourteenth Amendment.[62]

The district court concluded that section 13981 of the Act was an unconstitutional exercise of Congress's Commerce Clause power, using the Supreme Court's holding in *Lopez* to support its reasoning.[63] The district court concluded that section 13981 was also not within section 5 of the Fourteenth Amendment because Congress may not regulate purely private conduct under that section.[64]

The government and Brzonkala appealed the decision, and on December 23, 1997, a divided panel of the Fourth Circuit reversed the judgment of the district court and held that section 13981 was a legitimate exercise of Commerce Clause power.[65] The panel reasoned that according to *Lopez* and prior Commerce Clause cases, "a reviewing court need only determine 'whether a rational basis existed for concluding that a regulated activity' substantially affects interstate commerce."[66] The court found the extensive congressional findings to be an important difference between this case and *Lopez* and reasoned that although *Lopez* refused to expand Congress's commerce power to uphold section 922(q), it did not overrule any Commerce Clause precedent or abandon the rational basis test.[67] Because (1) Congress made extensive findings; (2) VAWA is a civil rather than criminal statute; (3) VAWA involves an area of generally federal responsibility–civil rights; and (4) VAWA supplements rather than supplants state laws, the Fourth Circuit panel held that Congress had constitutional authority to enact section 13981.[68] Furthermore, the court noted that *Lopez* did not require a jurisdictional element or that the regulated activity be economic, but if it had, VAWA "regulates an activity that is 'an essential part of a larger regulation of economic activity.'"[69] Two months later, the full

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62. *See id.* at 828.
63. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 786 (W.D. Va. 1996).
64. *See id.* at 796.
65. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 974 (4th Cir. 1997).
66. *Id.* at 965 (quoting *Lopez*, 514 U.S. at 557).
67. *See id.*
68. *See id.*
69. *Id.* at 972 (quoting *Lopez*, 514 U.S. at 561-63).

court vacated the judgment and reheard the case en banc on March 3, 1998.[70]

B. *The Fourth Circuit's Decision*

A year after hearing oral argument in the case, the Fourth Circuit, in a seven to four decision, affirmed the district court's ruling that Brzonkala properly stated a claim under section 13981, but held that section 13981 of VAWA "simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded."[71] Judge Luttig, writing for the court, noted that Brzonkala first defended section 13981 as a constitutional exercise of power under section 5 of the Fourteenth Amendment, but after the Supreme Court's decision in *City of Boerne v. Flores*,[72] resorted to defending the section under the Commerce Clause power.[73] Therefore, the court focused its discussion on the Commerce Clause power.

1. The Commerce Clause

The Fourth Circuit reasoned that because the Supreme Court "substantially clarified the scope and the limits of Congress'[s] Article I, Section 8 power" in *Lopez*, it should base its analysis of the case on the standards set forth in *Lopez*.[74] The court interpreted *Lopez* as holding that in order for an activity to substantially affect interstate commerce so that it may be regulated under the Commerce Clause, the activity must either

> (1) . . . arise out of or [be] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce, [or] (2) [be a regulation that] include[s] a jurisdictional element to ensure, "through case-by-case inquiry," that each specific

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70. *See Brzonkala*, 132 F.3d 949 (4th Cir. 1997), *rev'd en banc*, 169 F.3d 820 (4th Cir. 1999).

71. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 826 (4th Cir. 1999).

72. 521 U.S. 507, 519 (1997) (holding that the Religious Freedom Restoration Act was an unconstitutional exercise of Congressional authority pursuant to section 5 of the Fourteenth Amendment because the Enforcement Clause is limited to remedial regulation addressed toward state action).

73. *See Brzonkala*, 169 F.3d at 826.

74. *Id.* at 830.

> application of the regulation involves activity that in fact affects interstate commerce.[75]

The court then analogized section 13981 to the Gun-Free School Zones Act, finding that section 13981 does not regulate an economic activity or contain a jurisdictional element just as the Gun-Free School Zones Act neither regulated an economic activity nor had a jurisdictional element.[76] For this reason, the court concluded section 13981 "cannot be sustained in the authority of *Lopez*, nor any of the Court's previous Commerce Clause holdings, as a constitutional exercise of Congress'[s] power to regulate interstate commerce."[77]

According to the court, section 13981 regulates violent crime that is not commercial and, therefore, not economic.[78] The court recognized the reaffirmation of *Wickard v. Filburn*[79] in *Lopez*, but stated that "the decision does not, in such circumstances, authorize the regulation of intrastate conduct falling outside even the Court's relatively generous conception of economic activity."[80] In addition, the court advanced the idea that it is the court's duty to carefully ponder the implications of its holdings upon our federal system of government especially when it concerns an area of law that has historically been reserved for the states.[81] States have historically been sovereign over the areas of criminal law and domestic relations.[82] To the Fourth Circuit, gender-motivated violence does not affect interstate commerce any differently than any other significant problem does.[83]

The court rejected Brzonkala's argument that section 13981 differed from section 922(q) because of the extensive congressional findings of a substantial effect on interstate commerce, stating that:

> If we were to hold that a statute like section 13981, which regulates purely private, noneconomic activity at the very core of traditional

75. *Id.* at 831 (citations omitted) (quoting *Lopez*, 514 U.S. at 561).

76. *See id.* at 830-31.

77. *Id.* at 833; *see also* Kropf, *supra* note 50, at 391 ("The majority opinion by Judge Luttig analyzed the case under *Lopez* and concluded that because VAWA did not directly regulate an economic activity or contain a jurisdictional element, it did not satisfy the *Lopez* standard.").

78. *See Brzonkala*, 169 F.3d at 833.

79. 317 U.S. 11 (1942).

80. *Brzonkala*, 169 F.3d at 833.

81. *See id.*

82. *See id.*

83. *See id.*

> state concern and has only the most attenuated relation to interstate commerce, could nonetheless be sustained under the Commerce Clause based upon no more than the kind of generalized findings of state shortcomings made here, then Congress could circumvent the constitutional limits on federal power imposed by both the Commerce Clause and the Fourteenth Amendment, and claim a general police power, because charges that States have failed fully to eradicate or remedy bias can be made about nearly every area of traditional state concern.[84]

The court simply refused to accept Congress's determination of the effect of gender-motivated crimes of violence on interstate commerce.[85]

2. The Enforcement Clause

In response to appellant's alternative argument that section 13981 is a constitutional exercise of authority under section 5 of the Fourteenth Amendment, the court held that Congress may not regulate purely private conduct under the Fourteenth Amendment's Enforcement Clause.[86] The Fourteenth Amendment provides that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws . . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[87] The court reasoned that because the Fourteenth Amendment was directed at the states, it can only be violated by state action[88] and Congress did not enact section 13981 as a remedy for state action violating the Constitution.[89]

C. Chief Judge Wilkinson's Concurring Opinion

Chief Judge Wilkinson, in his concurring opinion, examined the role of judicial activism in the past century and concluded that only in the rarest cases should a court overturn the action of a legislature and then only when required to preserve the values of our federal

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84. *Id.* at 853 (citation omitted).
85. *See* Kropf, *supra* note 50.
86. *See Brzonkala*, 169 F.3d at 853.
87. U.S. CONST. amend. XIV, §§ 1, 5.
88. *See Brzonkala*, 169 F.3d at 861-70.
89. *See id.*

system.[90] Admitting that section 13981 is a good law for society and that violence against women is a problem that America must address, Judge Wilkinson maintained that VAWA's civil suit provision encroaches on state government and its regulation of domestic relations and, therefore, must be held unconstitutional.[91] According to Judge Wilkinson, "the structural dictates of dual sovereignty must not ebb and flow with the tides of popular support."[92]

D. *Judge Niemeyer's Concurring Opinion*

Judge Niemeyer, in his concurring opinion, referred to the Tenth Amendment, which states that those powers "not delegated to the United States or prohibited to the States by the Constitution [are] reserved to the States or to the people."[93] According to Niemeyer, allowing an overly broad exercise of the commerce power, like that required to uphold section 13981, would substantially infringe on the general police power retained by the states under the Tenth Amendment.[94] Acknowledging that "the volume of interstate commerce has expanded to the point where today it is difficult to delineate between interstate and local commerce,"[95] Judge Niemeyer, however, concluded that "a local activity, in order to be covered by the Commerce Clause power, must have a *direct effect* on interstate commerce such that its regulation 'targets' interstate commercial activity."[96] Judge Niemeyer would impose the tort principle of proximate cause to determine whether an activity is remote and therefore unapproachable under the Commerce Clause power.[97] In the case at bar, Congress attempted to regulate a social ill and not commerce.

90. *See id.* at 889-98 (Wilkinson, J., concurring).
91. *See id.* (Wilkinson, J., concurring).
92. *Id.* at 896 (Wilkinson, J., concurring).
93. *Id.* at 898 (Niemeyer, J., concurring); *see also* U.S. CONST. amend. X.
94. *See id.* (Niemeyer, J., concurring).
95. *Id.* (Niemeyer, J., concurring).
96. *Id.* at 901 (Niemeyer, J., concurring).
97. *See id.* (Niemeyer, J., concurring).

E. *Judge Motz's Dissent*

Judge Motz, who wrote the majority opinion for the Fourth Circuit panel decision upholding VAWA, wrote the dissent in the en banc decision and made arguments similar to those made by the panel.[98] According to the dissent, "[t]he majority can reach this conclusion only by disregarding controlling Supreme Court precedent, by refusing to give Congress's eminently rational findings proper deference, by creating troubling new rules of constitutional analysis, and by mischaracterizing the statute before us."[99]

"First, the dissent argue[d] that the majority created a new test by distorting *Lopez* and disregarding other Supreme Court precedent."[100] According to the dissent, *Lopez* went beyond the two categories of economic activity and jurisdictional element to determine that the possession of guns near schools did not substantially affect interstate commerce.[101] The dissent criticized the majority for misinterpreting *Lopez* by disregarding other factors considered by the Court and ignoring the rational basis test affirmed by *Lopez*.[102] The substantial congressional record, according to the dissent, "inexorably leads to the conclusion that Congress had a rational basis for finding that gender-motivated violence substantially affects interstate commerce."[103]

Second, the dissent criticized the majority for failing to follow a model of judicial restraint and to adhere to the strong presumption of constitutionality for legislative acts.[104] Judge Motz argued that the majority favored federalism over separation of powers.[105] According to the dissent, "a court faced with a challenge to an exercise of the commerce power owes even greater deference to Congress than a court asked to determine whether a federal statute violates an express prohibition of the Constitution."[106]

98. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997), *rev'd en banc*, 169 F.3d 820 (4th Cir. 1999).
99. *Brzonkala*, 169 F.3d at 906 (Motz, J., dissenting).
100. Kropf, *supra* note 50, at 394.
101. *See Brzonkala*, 169 F.3d at 917 (Motz, J., dissenting).
102. *See id.* (Motz, J., dissenting).
103. *Id.* at 906 (Motz, J., dissenting).
104. *See id.* at 921 (Motz, J., dissenting).
105. *See id.* (Motz, J., dissenting).
106. *Id.* at 912 (Motz, J., dissenting).

Third, the dissent criticized the majority's argument that to uphold VAWA would grant a general police power to the federal government, arguing that the majority felt the need to draw a line, and so they did without any precedent or reason for doing so.[107] According to the dissent, the court may not strike down legislation simply because there must be some limit to congressional authority out of fear that they may one day enact more invasive legislation.[108]

Finally, the dissent argued that VAWA differs from *Lopez* because it does not supersede state action, but instead regulates civil rights, an area of federal concern.[109] When "there is persuasive evidence that the states have not adequately protected the rights of a class of citizens," then it is within Congress's authority to act.[110] In addition, the dissent pointed out that Congress noted that "each and every one of the existing civil rights laws covers an area in which some aspects are also covered by State laws."[111]

IV. ANALYSIS

A. *Did* Lopez *Get It Right? Time Will Tell . . . .*

Because the Fourth Circuit based its entire opinion in *Brzonkala* on the Supreme Court's 1995 decision in *Lopez*, it is important to examine *Lopez* in light of the long line of Supreme Court Commerce Clause jurisprudence. Numerous scholars have noted the change in the Court's jurisprudence that came with the holding in *Lopez*.[112] The decision in *Lopez* has been credited with changing "any predictive certainty" and "muddl[ing] the well-settled jurisprudence of the Commerce Clause."[113] Former Commerce Clause jurisprudence gave Congress great leeway to promulgate statutes with only nebulous connections to interstate commerce.[114] For example, Supreme Court holdings in *Katzenbach, Heart of Atlanta,* and *Wickard*,[115] to name a few, forwarded the proposition that the individual's own activity may be insignificant, but when his

107. *See id.* at 925 (Motz, J., dissenting).
108. *See id.* (Motz, J., dissenting).
109. *See id.* (Motz, J., dissenting).
110. *Id.* at 931 (Motz, J., dissenting).
111. *Id.* at 931 (Motz, J., dissenting) (quoting S. REP. NO. 102-197, at 49).
112. *See, e.g.*, Kropf, *supra* note 50.
113. *Id.* at 373.
114. *See id.*
115. *See* discussion and notes *infra* Part II.

contribution is combined with others similarly situated, it is no longer insignificant and may be regulated by Congress under the Commerce Clause power.[116] In fact, in *Heart of Atlanta*, which concerned the constitutionality of the Civil Rights Act, the Supreme Court acknowledged that Congress was legislating against moral wrongs, but held the law valid because the evidence proved the effect of racial discrimination on interstate commerce.[117] Cases along this line of jurisprudence held that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[118] In addition, the Supreme Court consistently held that the mere fact that Congress said a particular activity affects commerce does not preclude examination by the Court, but when the Court finds that Congress had a rational basis for such a finding, its investigation ends.[119] With *Lopez*, the Court attempted to limit this practice, but succeeded in only confusing the standards by articulating a new standard not found in precedent (while claiming to be following precedent).[120] "In fact, 'prior to *Lopez*, the concept of a jurisdictional element did not present itself in Commerce Clause case law.'"[121]

The VAWA decisions demonstrate the difficulty lower courts have had in applying *Lopez*.[122] Since VAWA's enactment in 1994, it has faced several challenges and "[a]lthough these courts relied on *Lopez*, they reached different results, demonstrating the difficulty of applying *Lopez*."[123] Likely, the federal courts' difficulty lies in the contrast of the standard set forth in *Lopez* with the long line of Supreme Court jurisprudence dating back more than half a century.

B. *Did the Fourth Circuit Interpret* Lopez *and/or Commerce Clause Jurisprudence Correctly?*

The Fourth Circuit relied heavily, if not solely, on *Lopez* when ruling that "[u]nder the principles articulated by the Court in *Lopez*,

116. *See, e.g.*, Katzenbach.v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).
117. *See Heart of Atlanta Motel*, 379 U.S. 241.
118. United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949).
119. *See id.*
120. *See id.*
121. Cain, *supra* note 50, at 403 (quoting Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1859 (1997)).
122. *See id.*
123. Kropf, *supra* note 50, at 374.

it is evident that 42 U.S.C. § 13981, like the Gun-Free School Zones Act, does not regulate an activity sufficiently related to interstate commerce to fall even within the broad power of Congress under the Commerce Clause."[124] However, the Fourth Circuit interpreted the Court's holding in *Lopez* to stand for the proposition that "because the Gun-Free School Zones Act 'neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce, it exceeded the authority of Congress.'"[125] *Lopez* does not require the presence of these two elements–regulation of commercial activity and jurisdiction–in order for a statute to be constitutional. The Court merely based its decision in *Lopez* on the lack of these two factors.[126] The Court also looked to the lack of congressional findings and the fact that the statute displaced state policy in an area of traditional state concern.[127]

The Civil Rights Act, at issue in *Katzenbach* and *Heart of Atlanta*,[128] does not directly regulate an economic activity but has still been upheld as a constitutional exercise of the Commerce Clause power.[129] The Court held that discrimination has a substantial impact on interstate commerce and never held that the individual activity need be economic.[130] So long as it has a substantial effect on interstate commerce, the individual activity whether economic or not, may be regulated.[131] The civil right to be free from gender-motivated violence parallels the civil right to be free from racially-motivated violence, so the court should evaluate both similarly.

The Fourth Circuit panel held, and defendants Morrison and Crawford conceded, that *Lopez* does not hold that a statute must regulate economic activity to be a constitutional exercise of commerce power, reasoning that "[s]uch a holding could not be squared with past Commerce Clause jurisprudence."[132] When struggling to harmonize its holding with solidly established precedent such as

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124. Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820, 830 (4th Cir. 1999).
125. *Id.* at 831-32 (citations omitted) (quoting *Lopez*, 514 U.S. at 551).
126. *See Lopez*, 514 U.S. at 558-61; Kropf, *supra* note 50, at 395-96.
127. *See Brzonkala*, 169 F.3d at 836-52.
128. *See* discussion and notes *supra* Part IV.A.
129. *See id.*
130. *See Katzenbach*, 379 U.S. at 303-05; *Heart of Atlanta*, 379 U.S. at 255-62.
131. *See id.*
132. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 972 (4th Cir. 1997).

Wickard, the Fourth Circuit went so far as to interpret *Lopez* as "clearly foreclos[ing] either reliance upon such authority or application of such analysis to sustain congressional regulation of *noneconomic* activities."[133] The Fourth Circuit misinterpreted the reasoning of *Lopez*.[134] *Lopez* did not disturb any prior holding of the Court but simply declined to expand the holdings to the Gun-Free School Zones Act, especially when Congress itself had not included any findings of the regulated activity's substantial effect on interstate commerce. According to the dissent in *Brzonkala*, "this new rule depends upon a distorted view of *Lopez* and a cavalier disregard for the Supreme Court's other Commerce Clause precedents."[135] There is no doubt that the Court's decision in *Lopez* marks a heightened level of scrutiny and adherence to principles of federalism, but it by no means marks a destruction of prior Supreme Court precedent in Commerce Clause jurisprudence. The significance of *Lopez* remains unclear, but one thing is clear–*Lopez* did not hold that a statute must regulate an economic activity and have a jurisdictional element in order to be upheld under the Commerce Clause.[136]

C. *A Comparison of VAWA with the Gun-Free School Zones Act*

The Violence Against Women Act is very different from the Gun-Free School Zones Act and therefore, should be evaluated differently. VAWA differs from the Gun-Free School Zones Act in that: (1) VAWA regulates an activity that actually affects the national economy rather than merely threatens to do so; (2) it does not regulate areas of traditional state concern; (3) the individual involved in this particular case affected interstate commerce rather than just threatening to do so; and finally, (4) Congress produced extensive findings concluding that violence against women has a substantial effect on interstate commerce.[137]

First, "[u]nlike the mere threat of violence involved in the Gun-Free School Zones Act overturned in *Lopez*, section 13981 deals with

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133. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 839 (4th Cir. 1999).

134. *See* Cain, *supra* note 50, at 401-04.

135. *Id.*

136. *See generally* Darold W. Killmer & Mari Newman, *VAWA: A Civil Rights Tool for Victims of Gender-Motivated Violence*, 28 COLO. LAW. 77 (Sept. 1999).

137. *See generally* United States v. Lopez, 514 U.S. 549; *Brzonkala*, 169 F.3d 820.

actual acts of gender-based violence, whose impact on interstate commerce, though indirect, is far from remote or speculative."[138] The government, in *Lopez*, argued that the possession of a firearm in school may result in violent crime that in turn may affect the national economy because of the costs of violent crime and the threat to the educational process created by the presence of guns in schools.[139] VAWA, by contrast, regulates a behavior that Congress has found substantially affects interstate commerce.[140] The findings demonstrate that violence against women *affirmatively impacts* the economy and interstate commerce.[141] In the case of the Gun-Free School Zones Act, the Court held that gun possession in a school zone may or may not affect the economy.[142]

Second, VAWA does not infringe on traditional areas of state concern.[143] Although criminal law has traditionally been an area of state concern, VAWA offers a civil rather than a criminal remedy.[144] In addition, VAWA supplements state law rather than supplants it. In fact, VAWA expressly excludes any state-law claims for divorce, alimony, equitable distribution of marital property, or child custody from federal jurisdiction.[145] The statute does not prevent the states from exercising their police power to combat gender-motivated violent crimes, but rather offers an additional remedy to the victims of those crimes. Nothing in the statute prevents the victim or the state from bringing state criminal charges or tort actions. Section 13981 regulates conduct implicating civil rights, and civil rights are an area of federal, not state, concern.

Third, the respondent in *Lopez* was a student at a local high school and, unlike Brzonkala, he had not moved in interstate commerce.[146] Brzonkala, on the other hand, was a resident of Minnesota attending a university in Virginia.[147] After the rape, Brzonkala was so upset and fearful that she was forced to withdraw from the university and return home to Minnesota.[148] She then

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138. Ericson v. Syracuse Univ., 45 F. Supp. 2d 344, 348 (S.D.N.Y. 1999).
139. *See Lopez*, 514 U.S. at 563-64.
140. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 965-68 (4th Cir. 1997).
141. *See id.*
142. *See Lopez*, 514 U.S. at 567-68.
143. *See, e.g.,* Doe v. Doe, 929 F. Supp. 608, 617 (D. Conn. 1996).
144. *See Brzonkola*, 132 F.3d at 970-71.
145. *See* Violence Against Women Act, 42 U.S.C. § 13981(e)(4) (1994).
146. *See Lopez*, 514 U.S. at 551.
147. *See Brzonkala*, 169 F.3d 820.
148. *See id.*

attended a college located within four miles of her parent's home and lived with her parents while attending that school.[149] Her actions illustrate the effect gender-motivated violence has on interstate travel: the fear of rape and violent assault discourages women from traveling. This fear reduces their visits to restaurants or hotels set up to meet the needs of interstate travelers just as the discrimination of members of certain races discouraged those races from interstate travel when the Civil Rights Act was enacted.

Finally, VAWA differs from the Gun-Free School Zones Act because of the voluminous findings Congress made when it enacted VAWA. Among its findings are statistics such as: "Violence is the leading cause of injury to women ages 15-44,"[150] and "for the past 4 years, the U.S. Surgeons General have warned that family violence–not heart attacks or cancer or strokes–poses the single largest threat of injury to adult women in this country."[151] These congressional findings, as the Court noted, were lacking in the government's argument in *Lopez*.[152]

D. *VAWA As a Constitutional Exercise of the Enforcement Clause Power of the Fourteenth Amendment*

In *Brzonkala*, appellants initially defended section 13981 under Congress's power pursuant to section 5 of the Fourteenth Amendment, but after the Supreme Court's decision in *City of Boerne v. Flores*,[153] retreated to defend VAWA primarily as an exercise of Congress's power under the Commerce Clause. *City of Boerne* held that the Enforcement Clause power only extends to the enforcement of the provisions of the Fourteenth Amendment, and it is remedial and not substantive.[154] Therefore, since the Fourteenth Amendment is directed to the states, Congress may only use its Enforcement Clause power to remedy state actions. Because VAWA provides a civil remedy for private conduct, it is difficult to argue that it falls under the Enforcement Clause power. However, the Supreme Court has held that a state may have a duty to act when private individuals violate the Fourteenth Amendment, and the state's failure to act

149. *See id.*
150. S. REP. NO. 103-138, at 38 (1993).
151. *Id.* at 41-42.
152. *See Lopez*, 514 U.S. at 562-63.
153. 521 U.S. 507 (1997).
154. *See id.* at 520.

is a state action itself that Congress can regulate via its Enforcement Clause power.[155] The majority of courts that heard cases involving VAWA have held it unnecessary to consider whether the Fourteenth Amendment authorizes Congress to enact VAWA because they have held that the Commerce Clause grants Congress such authority.[156] The Fourth Circuit held that "without any individualized showing of unconstitutional state action . . . Congress may not regulate purely private conduct pursuant to its Fourteenth Amendment enforcement power."[157]

E. *Other Court Opinions on the Constitutionality of VAWA*

The Fourth Circuit's restrictive interpretation of *Lopez* is not shared by other circuits. The Tenth Circuit, in *United States v. Bolton*,[158] held that "if a state regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce, 'the *de minimus* character of the individual instances arising under the statute is of no consequence.'"[159] In *United States v. Weslin*,[160] the Second Circuit held that "Congress may regulate to prevent the inhibition or diminution of interstate commerce . . . even when the activity controlled itself is not commercial."[161]

The district courts have been almost unanimous in holding that gender-motivated violence substantially affects interstate commerce. Fifteen district courts, including four since the Fourth Circuit's opinion in *Brzonkala*, have upheld VAWA, reasoning that the voluminous legislative record is clear evidence of the direct connection between VAWA and interstate commerce.[162] As put by one commentator,

> Less than a month after the Fourth Circuit rendered its opinion, a federal district judge in New York agreed with the other eleven district courts and admonished the Fourth Circuit for its finding [stating that]

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155. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).
156. *See, e.g.*, Doe v. Doe, 929 F. Supp. 608, 617 (D. Conn. 1996).
157. *Brzonkala*, 169 F.3d at 862.
158. 68 F.3d 396 (10th Cir. 1995).
159. *Id.* at 399 (quoting *Lopez*, 514 U.S. at 557-58).
160. 156 F.3d 292 (2d Cir. 1998).
161. *Id.* at 296 (citation omitted).
162. *See* Killmer & Newman, *supra* note 136.

> "[a] federal court should pause long and hard before declaring unconstitutional a statutory provision that is the product of such lengthy inquiry and detailed findings by . . . Congress itself consisting of the democratically elected representatives of the several states."[163]

In *Doe v. Doe*,[164] the first case to challenge the constitutionality of section 13981, the court reasoned:

> 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, is of such a nature to be as substantial an impact on interstate commerce as the effect of excess "home-grown" wheat harvesting which was found to have been properly regulated by Congressional enactment.[165]

V. THE UNITED STATES SUPREME COURT

On January 11, 2000, the Supreme Court heard oral argument in *Brzonkala v. Morrison*.[166] Many courts, constitutional scholars, and attorneys anxiously await this opinion. It is difficult to predict whether the Supreme Court will limit its prior interpretations of the Commerce Clause power and affirm the Fourth Circuit, or whether it will agree with the majority of district courts who have held that VAWA falls within the already set boundaries of Commerce Clause power. It is clear that many are waiting for the Supreme Court to clarify its reasoning in *Lopez*, which has confused lower courts for the past four years. One scholar has commented that the Court only has two options–"[e]ither it must overturn much of the Commerce Clause principles adopted over the past fifty years, significantly limiting the power of the federal government . . . [o]r it must make it perfectly clear that application of the *Wickard* aggregate effects test . . . is limited to solely commercial activities."[167]

The current Court, led by Chief Justice Rehnquist, has followed a theme of state autonomy without unnecessary interference by

163. Lisa Gelhaus, *Constitutional Challenge to VAWA Raises Ire*, TRIAL, June 1999, at 14 (quoting Ericson v. Syracuse Univ., 45 F. Supp. 2d 344, 346 (S.D.N.Y. 1999)).
164. 929 F. Supp. 608 (D. Conn. 1996).
165. *Id.* at 614; *see also* Wickard v. Filburn, 317 U.S. 111 (1942).
166. *See* Brzonkala v. Morrison, Nos. 99-5, 99-29, 2000 WL 41232 (Jan. 11, 2000).
167. Kolenc, *supra* note 53, at 931.

federal courts.[168] According to constitutional scholar Erwin Chemerinsky, "the most significant trend in the decisions by Chief Justice William Rehnquist's Court is protecting state sovereignty."[169] "In a series of decisions over the last four years, culminating in June with three handed down on the final day of the court's term, the court invoked principles of federalism and sovereign immunity to circumscribe the power of Congress to identify problems in need of uniform national solutions."[170] Chief Justice Rehnquist and Justices O'Connor, Thomas, and Scalia have all been active proponents of maintaining states' rights, especially in the areas of education and criminal law.[171] However, both Justices Kennedy and O'Connor concurred separately in *Lopez* to "emphasize the delicate balance required when the Court makes difficult choices on federalism principles" and to warn "that the Court should not return to an outdated understanding of commerce."[172] These Justices may not be willing to extend the limitations on Commerce Clause power set forth by the Court in *Lopez.*

Since its passage, Chief Justice Rehnquist has been openly critical of VAWA's constitutionality. Only a year ago, Rehnquist referred to VAWA

> as one of "the more notable examples" of "a series of laws passed by Congress that have expanded the jurisdiction of the federal courts" and that have raised the "[p]rospect that our system will look more and more like the French government, where even the most minor details are ordained by the national government in Paris."[173]

Justice Scalia has also been particularly outspoken in efforts to decrease the caseload of the federal courts.[174] These concerns, however, were addressed when section 13981 was specifically altered to restrict federal courts' supplemental jurisdiction over any

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168. *See* CHRISTOPHER E. SMITH, THE REHNQUIST COURT AND CRIMINAL PUNISHMENT 33 (1997).
169. Gelhaus, *supra* note 163, at 16.
170. Linda Greenhouse, *Justices to Rule on Right of Women to Sue Their Attackers*, N.Y. TIMES, Sept. 29, 1999, at A20.
171. *See, e.g.*, SMITH, *supra* note 168, at 31-33.
172. Kolenc, *supra* note 53, at 876.
173. *Brzonkala*, 169 F.3d at 842 n.12 (quoting William H. Rehnquist, *Remarks at the Annual Meeting of the American Law Institute* (May 11, 1998)).
174. *See* SMITH, *supra* note 168, at 32.

claim for divorce, alimony, equitable distribution of marital property, or child custody.[175]

In addition, if the Court overturns section 13981 of VAWA, it will be forced to distinguish many civil rights laws enacted under the Commerce Clause and/or the Fourteenth Amendment since those also apply to actions by private individuals rather than state actors and have the same nexus to interstate commerce. Given this grave predicament, the voluminous jurisprudence granting broad Commerce Clause authority that would have to be distinguished or overruled if the Fourth Circuit is upheld, and the expansive Congressional findings of the substantial effect of gender-motivated violence on interstate commerce, the Court will likely uphold the constitutionality of section 13981 of VAWA and distinguish it from the Gun-Free School Zones Act. However, given the nature of the current Court's position on state sovereignty and reduced federal intervention, this prediction is not a certainty.

VI. CONCLUSION

As demonstrated by the three *Brzonkala* opinions, the *Lopez* decision has left lower courts without guidance in their efforts to analyze cases based on the Commerce Clause. It is now up to the Supreme Court to redefine the boundaries of this authority clearly and precisely so that lower courts can effectively rely on its reasoning. *Brzonkala v. Morrison* offers the Supreme Court the perfect opportunity to perform this essential function.

Christine M. Devey

175. *See* Cain, *supra* note 50, at 385.