political organizations. Most importantly, a contextual analysis enables courts to narrowly tailor decisions based on political realities, thus facilitating congressional efforts to enact campaign finance reform without degrading the value and importance of the First Amendment. Such accommodation is vital to secure the integrity of the electoral process and to convince disenfranchised voters that they are as important to the political system as big-money corporations and PACs.

Comment

Brzonkala v. Virginia Polytechnic and State University: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits

*Chris A. Rauschl**

Christi Brzonkala, a student at Virginia Polytechnic Institute and State University (VPI), was brutally raped in the fall of 1994.[1] The incident occurred on the night of September 24th when Christi first met James Crawford and Antonio Morrison, two VPI football players, in a dorm room.[2] Morrison asked Christi to have sex with him, and Christi responded "No" twice.[3] Despite her repeated denials, Morrison twice forced Christi to have sexual intercourse with him.[4] Crawford also allegedly raped Christi once that evening.[5]

After identifying her assailants,[6] Christi filed a complaint with the university under its sexual assault policy.[7] The uni-

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1. Brzonkala v. Virginia Polytechnic and State Univ., 935 F. Supp. 779, 782 (W.D. Va.), *appeal docketed*, No. 96-2316 (4th Cir. Sept. 24, 1996).

2. *Id.*

3. *Id.*

4. *Id.* After the incident, Morrison told Christi, "You better not have any fucking diseases." *Id.*

5. *Id.*

6. When Christi met Morrison and Crawford, she only knew their given names and that they were members of the football team. *Id.* Christi first recognized the men about five months after the incident. *Id.* Before Christi filed her complaint with the university, a VPI student heard Morrison say, "I like to get girls drunk and fuck the shit out of them." *Id.*

7. *Id.* Christi did not file criminal charges against either assailant because she believed "that her failure to preserve physical evidence prevented her from doing so." Brief for Appellant at *2, Brzonkala v. Virginia Polytechnic and State Univ., 935 F. Supp. 779 (W.D. Va.) (Civ. A. No. 95-1358-R), *appeal docketed*, No. 96-2316 (4th Cir. Sept. 24, 1996) (visited Mar. 17, 1997)

versity's judicial committee held a hearing where Morrison admitted that he had sexual intercourse with Christi after she twice refused his requests by saying "No."[8] Crawford also testified that Morrison had sexual contact with Christi, but denied that he himself had any sexual contact with her.[9] The committee found Morrison guilty of sexual assault and suspended him for two semesters,[10] but imposed no penalty on Crawford because of insufficient evidence.[11] Morrison appealed the committee's findings, and VPI's Vice President suspended the sanctions until after Morrison's graduation because he considered them "excessive."[12] After hearing that Morrison would return to school the following semester,[13] Christi canceled her plans to return to the university because she feared for her safety.[14]

Statistics demonstrate that situations like Christi's are all too common in the United States, where violence against women is pervasive.[15] In response to this problem and public

<http://www.soconline.org/LEGAL/BRZONKALA/111896.html> [hereinafter Brief for Appellant].

8. *Brzonkala*, 935 F. Supp. at 782.

9. *Id.*

10. *Id.* Morrison appealed, and the appeals officer upheld the sanction. *Id.* Morrison filed another appeal in which he claimed that VPI violated his due process rights because it failed to disseminate its sexual assault policy. Brief for Appellant, *supra* note 7, at *2. The committee held another hearing and re-imposed the suspension against Morrison, but only found him guilty of using abusive language. *Id.* at *3; *see also Brzonkala*, 935 F. Supp. at 782 (stating that Christi learned that the committee only found Morrison guilty of using abusive language through a newspaper article).

11. 935 F. Supp. at 782.

12. Brief for Appellant, *supra* note 7, at *3. The Vice President only required that Morrison attend a one-hour class on acceptable student behavior and deferred his suspension until after graduation. *Id.*

13. Morrison returned to school on a full athletic scholarship. *Id.* The university did not tell Christi that it had deferred Morrison's suspension. *Id.* Christi only learned of his reinstatement through a *Washington Post* article. *Brzonkala*, 935 F. Supp. at 782.

14. *Id.*

15. A woman is beaten by her partner every 15 seconds. *Violence Against Women: Victims of the System: Hearings on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 238 (1991) (statement of Elizabeth Athanasakos, National President, National Federation of Business and Professional Women, Inc.) [hereinafter *1991 Hearings*]. Violence against women is the leading cause of injury to women ages 15 to 44. S. REP. NO. 103-138, at 38 (1993). Reported assaults against women totaled over 1.1 million in 1991, and unreported assaults account for over three times that amount. *Id.* at 37. In 1991, 2,000 women reported being raped and 90 women were murdered each week, with men committing 90% of these crimes. *Id.* at 38. The Senate report also found that "4 million women a year are victims of domestic violence" and that

outcry over gender-based crime, Congress enacted the Violence Against Women Act of 1994 (VAWA).[16] The Act strengthens penalties for existing federal sex crimes and provides $1.6 billion over six years for education, research, treatment of domestic and sex crime victims, and improvement of state criminal justice systems.[17] The Act also creates a civil cause of action for victims of gender-motivated crimes.[18]

Christi Brzonkala was one of the first individuals who attempted to use this new civil cause of action against her assailants.[19] Specifically, Christi accused Morrison and Crawford of sexually assaulting her with discriminatory animus toward her gender that violated her right to be free from gender-motivated violence under the VAWA.[20] The *Brzonkala* court, however, dismissed her claim, holding that Congress lacked the authority to create this cause of action under either the Commerce Clause or section 5 of the Fourteenth Amendment.[21]

Brzonkala v. Virginia Polytechnic and State University raises important issues regarding Congress's ability to enact

three out of four women will be the victim of a violent crime at least once in their lifetime. *Id.* More recent crime statistics show that a woman was forcibly raped every five minutes in 1995. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 4 (1995).

16. Violent Crime Control and Law Enforcement Act of 1994, tit. IV, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994) (codified as amended in scattered titles of U.S.C.). Congress enacted the VAWA to combat "the escalating problem of violent crime against women." S. REP. NO. 103-138, at 37 (1993) (indicating why Senator Joseph Biden introduced the bill).

17. *See* 108 Stat. at 1902-55 (listing appropriations in various sections of Title IV); *see also* Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 253 (1995) (noting that the VAWA "attempts to make crimes committed against women considered in the same manner as those motivated by religious, racial, or political bias").

18. 42 U.S.C. § 13981(c) (1994). The VAWA's civil cause of action is generally referred to as the "civil rights remedy," "the VAWA," or "the Act" throughout this Comment.

19. Prior to Christi's case, only one reported case had challenged the constitutionality of the VAWA's civil cause of action. *See* Doe v. Doe, 929 F. Supp. 608, 610 (D. Conn. 1996) (upholding the VAWA under the Commerce Clause).

Christi also sued VPI under the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1994). *See* Brzonkala v. Virginia Polytechnic and State Univ., 935 F. Supp. 772, 773 (W.D. Va.), *appeal docketed*, No. 96-2316 (4th Cir. Sept. 24, 1996). The district court dismissed this claim. *Id.* at 779.

20. *See Brzonkala*, 935 F. Supp. at 784 (discussing Brzonkala's factual support for her allegation). The court held that Christi successfully stated a claim for relief under the VAWA's civil rights remedy. *Id.* at 785.

21. *Id.* at 801.

legislation to protect victims of gender-based crimes in federal and state courts. The case tests the limits of congressional authority under the Commerce Clause following the Supreme Court decision in *United States v. Lopez*[22] and examines the scope of congressional power under section 5 of the Fourteenth Amendment.

This Comment argues that *Brzonkala* was incorrectly decided because section 5 of the Fourteenth Amendment authorized Congress to enact the VAWA. Part I discusses Commerce Clause and Fourteenth Amendment jurisprudence, and the VAWA and its legislative history. Part I also discusses *Doe v. Doe*,[23] the only other case addressing the VAWA's constitutionality. Part II outlines the *Brzonkala* court's decision and its analysis of Congress's authority to enact the VAWA. Part III argues that the VAWA is beyond congressional power under the Commerce Clause, but is within the scope of congressional authority under section 5 of the Fourteenth Amendment. This Comment concludes that courts should recognize Congress's ability to create private causes of action to remedy state deprivations of equal protection rights, and therefore should uphold the VAWA.

I. CONGRESSIONAL AUTHORITY TO REGULATE GENDER-BASED CRIMES

A. THE FEDERAL GOVERNMENT'S POWER TO REGULATE

The federal government possesses limited powers that are specifically enumerated in the Constitution.[24] As early as 1819, the Supreme Court declared that "[t]he principle that [the federal government] can exercise only the powers granted to it . . . is now universally admitted."[25] While several parts of

22. 115 S. Ct. 1624, 1634 (1995) (striking down the Gun-Free School Zones Act of 1990).

23. 929 F. Supp. 608 (D. Conn. 1996).

24. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in [the] Congress . . . ."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("Th[e] [federal] government is acknowledged by all to be one of enumerated powers."); THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-1, at 297 (1988) ("Congress is thus a legislative body possessing only *limited* powers—those granted to it by the Constitution.").

25. *McCulloch*, 17 U.S. at 405; *see also* U.S. CONST. amend. X ("The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

the Constitution grant Congress various powers,[26] the primary grant of authority originates from Article I, section 8.[27] That section explicitly lists Congress's most significant powers, including the power to tax, regulate commerce, produce money, and declare war.[28] This section also grants Congress the power to make laws that are "necessary and proper" to carry out all of the Constitution's enumerated powers.[29] The Necessary and Proper Clause is a broad grant of congressional authority to enact legislation that is "appropriate" to promote legitimate constitutional goals.[30]

B. CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

The enumerated power upon which Congress primarily relies to enact legislation is the Commerce Clause,[31] which allows

26. *See, e.g.*, U.S. CONST art. IV, § 1 (granting Congress the power to give full faith and credit to other states' acts, records, and judicial proceedings); *id.* art. IV, § 3 (granting Congress the power to admit new states); *id.* art. V (granting Congress the power to amend the Constitution); *id.* amend. XIV, § 5 (granting Congress the power to enforce due process, equal protection, and other Fourteenth Amendment rights); *id.* amend. XV, § 2 (granting Congress the power to limit infringements on voting rights that are based on race, color, or previous condition of servitude); *id.* amend. XVI (granting Congress the power to tax income); *id.* amend. XIX, § 2 (granting Congress the power to limit infringements on voting rights that are based on sex); *id.* amend. XXVI (granting Congress the power to limit infringements on the voting rights of people 18 years of age or older).

27. *Id.* art. I, § 8.

28. *Id.*

29. *Id.* cl. 18.

30. The Supreme Court established the scope of the Necessary and Proper Clause in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." 17 U.S. at 421; *see also* TRIBE, *supra* note 24, § 5-3, at 301 (discussing the importance of the implied powers within clause 18 to the scope of congressional power). This broad formulation of congressional power applies not only to the enumerated powers defined in Article I, but to "all other Powers vested by this Constitution." U.S. CONST. art. I, § 8, cl. 18. "Necessary," as the Court defined it in *McCulloch*, does not mean "absolutely and indispensably necessary" to exercising a constitutional power, but instead means whatever measures are "useful and appropriate" to achieving that end. 17 U.S. at 354-56.

31. *See* TRIBE, *supra* note 24, § 5-4, at 305-06 ("The commerce clause is . . . the chief source of congressional regulatory power."). Congress has enacted, and the Supreme Court has upheld, numerous important Commerce Clause regulations since the 1930s. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 275-83 (1981) (upholding a fed-

Congress to "regulate Commerce . . . among the several States."[32] Under the Commerce Clause, Congress may regulate channels of interstate commerce,[33] instrumentalities of or persons or things in interstate commerce,[34] or activities having a substantial effect on interstate commerce.[35] Between 1937 and 1994,[36] the Supreme Court found every congressional enactment under the Commerce Clause sufficiently connected to interstate commerce to justify federal regulation.[37] One of the

eral regulation of private mining lands); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964) (upholding application of Title II of the Civil Rights Act of 1964 to a motel); Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (upholding application of Title II of the Civil Rights Act of 1964 to a restaurant); Wickard v. Filburn, 317 U.S. 111, 118-29 (1942) (upholding application of the Agricultural Adjustment Act of 1938 to a farmer growing and consuming wheat on his farm).

32. U.S. CONST. art. I, § 8, cl. 3.

33. *See Lopez*, 115 S. Ct. at 1629 (identifying three categories Congress may regulate under the Commerce Clause); *Heart of Atlanta Motel*, 379 U.S. at 261 (upholding application of the Civil Rights Act of 1964 to a motel that served interstate travelers); United States v. Darby, 312 U.S. 100, 123 (1941) (upholding a statute that prohibited goods produced in violation of work condition regulations from traveling in interstate commerce).

34. *Lopez*, 115 S. Ct. at 1629; *see also* Shreveport Rate Cases, 234 U.S. 342, 351-55 (1914) (upholding regulation of intrastate railways that competed with interstate railways); Southern Ry. Co. v. United States, 222 U.S. 20, 26-27 (1911) (upholding federal regulation of locomotives and railcars).

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

36. Prior to the Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court significantly constrained Congress's power under the Commerce Clause by imposing a variety of formal limitations. In an early Commerce Clause case, the Court held that Congress could not regulate manufacturing activities because they preceded commerce. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895). The Court also stated that Congress could not regulate activities that only *indirectly* affected interstate commerce. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (striking down regulation of slaughterhouse employees' hours and wages).

Jones & Laughlin Steel signaled the end of the Court's use of these formalistic limitations on the commerce power. In *Jones & Laughlin Steel*, the Court upheld the National Labor Relations Act of 1935, which created the right to form unions and required employer participation in collective bargaining, despite the statute's regulation of manufacturing and only indirect effect on interstate commerce. 301 U.S. at 38-40. The Court found a sufficient nexus to interstate commerce because the legislation targeted 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." *Id.* at 37.

37. *See supra* note 31 (listing important Commerce Clause cases after the 1930s); *see also* Perez v. United States, 402 U.S. 146, 147 (1971) (upholding Title II of the Consumer Credit Protection Act); *Darby*, 312 U.S. at 123 (upholding the Fair Labor Standards Act); *Jones & Laughlin Steel Corp.*, 301 U.S. at 49 (upholding the National Labor Relations Act of 1935); *cf.* Stephen M. McJohn, *The Impact of* United States v. Lopez*: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 2 (1995) ("*Lopez* thus breaks a long line of cases deferring to congressional action.").

most far-reaching examples of the Supreme Court's deference to Congress's use of its commerce power is found in *Wickard v. Filburn*.[38] In *Wickard*, the Supreme Court upheld a federal regulation limiting the amount of wheat an individual could grow on his farm for his own consumption.[39] The Court found that the Act's regulation of home-grown wheat was sufficiently linked to interstate commerce. The Court reasoned that while one farmer's excess production might not have a significant impact on interstate commerce, the same conduct repeated by those similarly situated could have a significant impact on interstate commerce by reducing market prices for wheat.[40]

In 1995, the Supreme Court unexpectedly limited Congress's commerce power in *United States v. Lopez*.[41] In *Lopez*, the Court for the first time in nearly sixty years struck down a statute enacted under the Commerce Clause.[42] The case involved Congress's 1990 enactment of the Gun Free School Zones Act (GFSZA), which criminalized "possess[ion of] a firearm at a place that the individual knows . . . is a school zone."[43] The Supreme Court held that the Act was not within Congress's Commerce Clause powers because it did not have a sufficient nexus with interstate commerce.[44]

38. 317 U.S. 111 (1942); *see also Lopez*, 115 S. Ct. at 1630 (stating that *Wickard* "is perhaps the most far reaching example of Commerce Clause authority").

39. *Wickard*, 317 U.S. at 128-29. Filburn grew 23 acres of wheat on his farm, exceeding his federally imposed quota. *Id.* at 114.

40. *Id.* at 128-29. Congress regulated wheat production to prevent fluctuations in wheat prices. *Id.* at 115. The Court recognized that Congress had the power to regulate commodity prices and that the Act promoted that purpose by limiting the supply of wheat. *Id.* at 128. Because Filburn grew wheat in excess of his quota, he did not buy wheat on the market. His actions defeated Congress's goal by reducing market demand and wheat prices. *Id.* at 128-29.

41. 115 S. Ct. 1624 (1995).

42. *See* McJohn, *supra* note 37, at 1 (noting that the last time the Court struck a federal statute enacted under the Commerce Clause was 1937). Despite creating a major rift in Commerce Clause jurisprudence, the Court reached its decision without overruling a single case. *See* Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801, 811 (1996) (discussing how *Lopez* avoided overruling prior cases).

43. 18 U.S.C. § 922(q)(2)(A) (1994).

44. *Lopez*, 115 S. Ct. at 1630-34.

The Court quickly concluded that the GFSZA did not regulate channels of interstate commerce or protect an instrumentality of interstate commerce, and stated that the Act could only possibly be sustained as a regulation of activity substantially affecting interstate commerce.[45] To preface its analysis, the Court noted that it had previously upheld regulations of a variety of *intrastate economic* activities that substantially affected interstate commerce.[46] The Court warned, however, that it would not test the constitutionality of regulations of noneconomic intrastate activity in "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."[47] The Court concluded that the GFSZA did not regulate an economic enterprise and was not an essential part of a larger regulation of economic activity.[48] The

45. *Id.* at 1630. The Court clarified that the third category required a "substantial effect," rather than merely an "effect" on interstate commerce. *Id.* Professor Merritt argues that the Court's use of the "substantial effect" requirement is analogous to the tort concept of proximate cause. Deborah Jones Merritt, *COMMERCE!*, 94 MICH. L. REV. 674, 679 (1995).

46. *Lopez*, 115 S. Ct. at 1630. The Court stated that *Wickard* was "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Id.* The Court also asserted that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.*

47. *Id.* at 1631. The Court has never held that the Commerce Clause allows regulation of only commercial or economic activity. *See* Brickey, *supra* note 42, at 807 (stating that the Court has not held that Congress can only regulate economic or commercial activities). Because the Court made the "economic" or "commercial" nature of the regulation in *Lopez* such an important factor, scholars have presented different views on its relevance. Some conclude that Congress can regulate noneconomic activity if it adversely affects an economic enterprise that is involved in commerce. *See, e.g., id.* at 811 (concluding that Congress may regulate noncommercial activity under the Commerce Clause if it adversely affects an economic enterprise engaged in commerce). Others contend that the Court will impose harsher limits on regulations of noncommercial or noneconomic activities than were previously imposed under the Commerce Clause. *See, e.g.*, McJohn, *supra* note 37, at 27 (arguing that the Court abandoned its lenient Commerce Clause analysis in a move towards imposing more limitations on Commerce Clause regulations). Still others argue that noneconomic regulations will withstand scrutiny only when they have a nexus with commercial transactions of an interstate magnitude, especially if a core state function is involved. *See, e.g.*, 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) (suggesting that the noneconomic nature of the GFSZA and its intrusion into a core state function were crucial to the Court's decision in *Lopez*).

48. *Lopez*, 115 S. Ct. at 1630-31. The Court noted that the regulation upheld in *Wickard* "involved economic activity in a way that the possession of a gun in a school zone does not." *Id.* at 1630. Justice Kennedy's concurring opinion came to a similar conclusion, noting that "unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Id.* at 1640 (Kennedy, J., concurring).

Court stated that the GFSZA was a criminal statute that "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[49] Moreover, the Court noted that the Act contained no jurisdictional element requiring the firearm at issue to affect or travel through interstate commerce before implicating the statute.[50]

In determining whether a regulated activity substantially affected interstate commerce, the Court stated that it would

49. *Id.* at 1630-31. The Court asserted that gun possession near schools did not constitute an "economic" activity, but did not define what "economic" meant. *Id.* Professor McJohn argues that "economic" could define gun possession if the term were interpreted broadly. McJohn, *supra* note 37, at 26-27. Education could also constitute an economic activity under a broad definition of "economic," because the student foregoes consumption and productivity in the present to invest in increased future productivity and consumption. *Id.* McJohn states that the Court "used the term in a narrower sense, leaving it for future cases to distinguish between economic and noneconomic activity." *Id.* at 27.

Although the Court did not provide a formal definition of "economic" or "commercial," it did note that "depending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 115 S. Ct. at 1633; *see also id.* at 1640 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far."). The Court made this statement while rejecting Justice Breyer's argument that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." *Id.* at 1633 (quoting Justice Breyer's dissenting opinion in *Lopez*). The Court stated that such a broad definition of "commercial" lacked any real limits and would impermissibly justify federal regulation of every aspect of local schools. *Id.* The Court acknowledged that determining whether an activity is commercial or noncommercial can result in legal uncertainty, but said that uncertainty always results when determining the limits of constitutionally enumerated powers. *Id.*

50. *Id.* at 1631. The Court distinguished a prior case upholding federal regulation of gun possession because it required a showing that the gun had an explicit connection to interstate commerce, whereas the GFSZA contained no such requirement. *Id.* (discussing United States v. Bass, 404 U.S. 336 (1971)). Some commentators believe that if the GFSZA would have required that the gun travel in interstate commerce, it could have withstood judicial scrutiny. *See* Brickey, *supra* note 42, at 817 (claiming that Congress could regulate gun possession near schools if it had the right jurisdictional hook); McJohn, *supra* note 37, at 34-35 (stating that Congress could regulate gun possession in school zones if it provided a jurisdictional requirement); *cf.* Scarborough v. United States, 431 U.S. 563, 575 (1977) (holding that a gun shown to travel through interstate commerce provided sufficient nexus to interstate commerce). *But see* Merritt, *supra* note 45, at 697 (stating that it is unclear whether a jurisdictional hook would have saved the GFSZA).

consider legislative findings as part of its "independent evaluation of constitutionality."[51] In *Lopez*, however, the Court could not consider the GFSZA's legislative history because Congress did not make any pre-enactment findings regarding the effects on interstate commerce of gun possession in a school zone.[52] The Court stated that it did not require congressional findings, but suggested that they would be helpful when a regulated activity's nexus to interstate commerce was not "visible to the naked eye."[53]

The Court then rejected the government's arguments that gun possession in a school zone substantially affected interstate commerce.[54] The government argued that guns in school zones increase violent crime, which hampers learning, results in lower productivity, and leads to a depressed national economy.[55] The Court rejected this "national productivity" argument because Congress could use such a rationale to support federal regulation of *any* activity found to affect national productivity, including areas of traditional state control, such as family law and education.[56] The Court also found unpersuasive the government's argument that guns in school zones increase crime and increased crime imposes costs on society through higher insurance.[57] The Court rejected this "costs of crime" argument because it would allow Congress to regulate all violent crimes and any activities that might lead to violent crimes.[58] The Court concluded that these rationales would require it "to pile inference upon inference" to uphold the Act and could result in a dramatic, unacceptable increase in federal power at the expense of state powers.[59]

Traditionally, the Court evaluated Congress's conclusions regarding a regulated activity's nexus to interstate commerce with a deferential rational basis standard of review.[60] In prior cases applying the extremely deferential standard, the Court considered whether Congress had a rational basis for concluding that a regulated activity has an effect on interstate commerce.[61] The Court in *Lopez*, however, applied a heightened version of rational basis review by independently evaluating whether a rational basis existed to conclude that the regulated conduct *in fact* had a substantial effect on interstate commerce.[62]

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

52. *Id.* The government conceded that "[n]either the statute nor its legislative history contained express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." Reply Brief for the Petitioner at 5-6, United States v. Lopez, 115 S. Ct. 1624 (1994) (No. 93-1260). Congress did provide post-enactment legislative findings to support the GFSZA's constitutionality in the Violent Crime Control and Law Enforcement Act of 1994, but the government did not formally rely on those findings as a substitute for the absence of them before the GFSZA's passage. *Lopez*, 115 S. Ct. at 1632 n.4.

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

54. *Id.*

55. *Id.*

56. *Id.* The Court objected to the use of rationales that could support federal usurpation of a state's general police power under the Commerce Clause. *Id.* The Court stated that the government's theory failed because allowing regulation of activities that adversely affect learning would also allow regulation of more core elements of education, including curriculum. *Id.* at 1633.

57. *Id.* at 1632.

58. *Id.*

59. *Id.* at 1634. The Court stated that accepting the government's arguments would allow Congress to regulate almost every activity. *Id.* at 1632. The Court also stated that accepting those rationales would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 1634.

60. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277 (1981) ("When Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational."); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (stating the test for appropriate use of the commerce power asks "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate"); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

61. The dissenting Justices in *Lopez* argued that the deferential rational basis review previously applied to Commerce Clause cases would have upheld the GFSZA. *Lopez*, 115 S. Ct. at 1657 (Souter, J., dissenting) ("[T]he Act in question passes the rationality review that the Court continues to espouse."); *id.* at 1661 (Breyer, J., dissenting) (stating that Congress could have rationally concluded that the gun possession's links to commerce were substantial).

62. *See id.* at 1631 (stating that the Court undertakes an independent evaluation of constitutionality under the Commerce Clause); *id.* at 1629 n.2 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") (quoting *Hodel*, 452 U.S. at 311); Frickey, *supra* note 47, at 728 (noting that the Court used a stringent variety of rational basis review); McJohn, *supra* note 37, at 28 (stating that the Court "abandoned its previous deference to Congress in favor of its own independent assessment of the effect on commerce"); Merritt, *supra* note 45, at 682-84 (claiming that the Court's level of review in *Lopez* exceeded traditional rational basis, but fell below intermediate scrutiny).

Professor McJohn claims that *Lopez* deviated from precedent in two ways. First, the Court asked not whether Congress had a rational basis for finding a

C. CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AMENDMENT

The Fourteenth Amendment's Equal Protection Clause states, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[63] While the Equal Protection Clause generally ensures that states treat similarly situated people the same, states may legitimately make some class-based distinctions.[64] Courts usually subject any class-based distinction to rational basis review[65] unless it involves protected categories such as race, alienage, national origin, or gender.[66] If a classification involves gender, for example, the courts apply intermediate scrutiny, which considers whether the classification is substantially related to an important state interest.[67]

As the Supreme Court recognized over 100 years ago, the Equal Protection Clause protects individuals only from state infringements of equal protection, not invasions by private citizens.[68] Despite the requirement of state action, the Amendment's protections can reach private conduct when it has sufficient ties to the state.[69] Private conduct implicates state action when the person who performed the act may "fairly be said to be a state actor," and exercised a state-created right or privilege, acted under imposition of the state, or acted under the state's responsibility.[70]

sufficient nexus with commerce, but whether the regulated activity *in fact* substantially affected interstate commerce. McJohn, *supra* note 37, at 28. Second, instead of directly assessing arguments about how gun possession could substantially affect interstate commerce, the Court focused on the ramifications of accepting those arguments. *Id.* at 28-29.

63. U.S. CONST. amend. XIV, § 1.

64. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (stating the Equal Protection Clause commands that "persons similarly situated should be treated alike").

65. Rational basis review is applied to all regulations that do not distinguish individuals based on their protected status (race, alienage, national origin, and gender). Under this standard, courts consider whether the classification was rationally related to a legitimate state interest. *See, e.g., id.* at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

66. *See, e.g., id.* (stating that classifications based on protected status require heightened judicial scrutiny). Courts apply strict scrutiny to classifications based on race, alienage, and national origin. *See, e.g., id.* (listing categories to which courts apply strict scrutiny). Such regulations are upheld if they are narrowly tailored to serve a compelling state interest. *See, e.g., id.* (stating the strict scrutiny standard). Gender-based classifications are subject to intermediate scrutiny. *See infra* note 67 and accompanying text (discussing the intermediate standard of review).

67. For cases discussing the intermediate scrutiny standard and its application to gender-based discrimination, see *Cleburne Living Ctr.*, 473 U.S. at 441; Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197-99 (1976).

68. The Civil Rights Cases, 109 U.S. 3, 11 (1883). The Court stated that section 1 of the Fourteenth Amendment "nullifies and makes void all State legislation, and State action of every kind . . . which denies to any [United States citizen] the equal protection of the laws." *Id.* The *Civil Rights Cases* held unconstitutional portions of the Civil Rights Act of 1875 that criminalized private actors' attempts to interfere on the basis of race with citizens' right to enjoy public accommodations. *Id.* at 18. Congress asserted authority to create the Act under section 5 of the Fourteenth Amendment. The Court concluded that section 5 did not authorize creation of the Act because Congress sought to regulate purely private conduct without identifying any state action that violated the Fourteenth Amendment. *Id.* at 14. The Court also recognized that the Act failed to correct any state violation of the Constitution. *Id.*

The Supreme Court has cited the state action requirement for violations of section 1 with approval throughout the Fourteenth Amendment's history. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) (applying the state action requirement with approval); Shelly v. Kraemer, 334 U.S. 1, 13 (1948) ("[A]ction inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."); *cf.* POLYVIOS G. POLYVIOU, THE EQUAL PROTECTION OF THE LAWS 540 (1980) (stating that "the doctrine of the *Civil Rights Cases*, namely that the Equal Protection Clause only extends to governmental or state conduct, has not been seriously questioned, and is now firmly established"). The state action requirement fulfills two basic purposes: (1) precluding the Constitution from preempting individual liberties, and (2) recognizing the two principals of division that organize our governmental structures, federalism and separation of powers. TRIBE, *supra* note 24, § 18-2, at 1691.

69. Courts use three different tests to determine whether private conduct is sufficiently connected to the state to implicate the protections of the Equal Protection Clause. The "exclusive state function test" considers whether the private actor is undertaking a task that has traditionally been handled exclusively by the state. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620-29 (1991) (finding state action in jury selection); Terry v. Adams, 345 U.S. 461, 468-70 (1953) (finding state action in private elections); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 318-19 (1995) (discussing the exclusive state function test). The "symbiotic relationship test" considers whether the relationship between the government and private party creates sufficient interdependence to warrant labeling the private actor as one of the state. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 722-24 (1961) (holding that a privately owned diner renting space from a state-owned parking garage was a state actor); Krotoszynski, *supra*, at 319 (discussing the symbiotic relationship test). The "nexus or compulsion test" considers whether the state encouraged or aided the private actor's conduct. *Id.* at 320.

70. *Lugar*, 457 U.S. at 937.

In addition to section 1's self-executing protections,[71] section 5 of the Fourteenth Amendment grants Congress the authority to enact legislation to enforce the Amendment. Section 5 states that "Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]"[72] and "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure [its] guarantees."[73] When Congress identifies an equal protection violation by applying judicially created standards of review to facts it has acquired, its determination of whether an equal protection violation exists is entitled to significant judicial deference.[74] Congress's choice of a remedy is also entitled to judicial deference and will be sustained if it is "plainly adapted" to enforcing the Amendment and does not violate other constitutional limitations.[75]

71. The Fourteenth Amendment section 1 prohibitions are judicially enforceable and do not require legislation to implicate its protections. *See* TRIBE, *supra* note 24, § 18-1, at 1688 (discussing constitutional provisions that are self-executing).

72. U.S. CONST. amend. XIV, § 5. Each Civil War Amendment grants Congress the power to enforce its respective protections. *See id.* amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

73. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); *cf.* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) ("Congress [is] chiefly responsible for implementing the rights created [under the Fifteenth Amendment].").

74. *See* Frickey, *supra* note 47, at 717 (stating that when Congress uses judicially articulated standards to determine constitutionality, the Court will give Congress substantial discretion in applying the standard to particular facts).

75. The scope of congressional power under section 5 is defined by the same formulation used to define the scope of congressional power under the Necessary and Proper Clause. *See Morgan*, 384 U.S. at 650-51 (stating that a Fourteenth Amendment section 5 enactment is constitutional if it enforces the Equal Protection Clause, is plainly adapted to that end, and is consistent with constitutional limitations); *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view . . . if not prohibited, is brought within the domain of congressional power."); *supra* note 30 and accompanying text (discussing the reach of congressional power under the Necessary and Proper Clause); *see also* City of Rome v. United States, 446 U.S. 156, 175 (1980) (stating that congressional power under section 2 of the Fifteenth Amendment is as broad as that under the Necessary and Proper Clause); *Katzenbach*, 383 U.S. at 326 (stating that the test applied to Fifteenth Amendment section 2 cases is the *McCulloch* test).

Unlike other constitutional provisions, the Tenth Amendment imposes less stringent limitations on Congress's power to regulate under the Civil War Amendments. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114, 1125 (1996) (noting federal power to abrogate state immunity from suit under section 5 of the Fourteenth Amendment); EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) ("Congress is not limited by the same Tenth Amendment constraints [under the Fourteenth Amendment] that circumscribe the exercise of its Commerce Clause powers."); *City of Rome*, 446 U.S. at 179-80 (stating that congressional authority under the Civil War Amendments overrides federalism concerns); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress could provide for private suits against states or their officials under section 5 of the Fourteenth Amendment, even though such suits would be impermissible in other contexts). *But cf.* Oregon v. Mitchell, 400 U.S. 112, 123-26 (1970) (striking down regulation of state elections under section 5).

When Congress identifies Fourteenth Amendment violations, it may regulate conduct that does not itself violate the Constitution so long as the regulation provides an appropriate remedy to the equal protection concern.[76] For example, in *City of Rome v. United States*,[77] the Court upheld legislation regulating conduct that had only a discriminatory *impact* on minority voting,[78] even though the conduct did not violate the Fifteenth Amendment.[79]

76. *See City of Rome*, 446 U.S. at 173-77 (holding that Congress could regulate conduct that perpetuated the effects of past discrimination, even though the regulated conduct did not violate the Constitution); *see also* Frickey, *supra* note 47, at 717 (stating that Congress has the power to "adopt overbroad prophylactic rules to protect against the violation of the standard").

77. 446 U.S. 156 (1980).

78. The City of Rome wanted to change its electoral system, but needed pre-clearance from the Attorney General under the Voting Rights Act of 1965. *Id.* at 160-62. The Attorney General denied clearance to some of the proposed changes because he feared they could have a discriminatory effect. *Id.* at 162. Despite finding that the changes were not made because of discriminatory intent, the Court sustained application of the Act because the discriminatory effects were sufficient to implicate the statute. *Id.* at 172.

79. The Court stated that it was unclear whether the Fifteenth Amendment required proof of discriminatory intent, but assumed that it did for the purposes of this decision. *Id.* at 173, 177; *see also* City of Mobile v. Bolden, 446 U.S. 55, 79 (1980) (upholding an at-large voting scheme despite the effect on black voters). The Court wrote that "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *City of Rome*, 446 U.S. at 177 (citing *Katzenbach*, 383 U.S. at 335).

The grants of power embodied in section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment are substantially similar, so cases addressing the scope of congressional power under either Amendment are relevant to both. *See, e.g.*, *City of Rome*, 446 U.S. at 207-08 n.1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."); United States v. Guest, 383 U.S. 745, 783-84 (1966) (Brennan, J., concurring) (noting that the language of both Amendments is virtually the same and that the courts should use the same standard to gauge the scope of congressional

The Court recognized even broader congressional power in *Katzenbach v. Morgan*.[80] In *Morgan*, the Court stated that Congress could not only identify Fourteenth Amendment violations by applying judicial standards of review to facts it had acquired,[81] but could create substantive rights that went beyond, or even conflicted with, judicial interpretations of rights under the Amendment.[82] In *United States v. Guest*,[83] a majority of the Court asserted, in dicta, an equally radical formulation of Congress's ability to define Fourteenth Amendment violations. In *Guest*, six Justices rejected previous cases requiring state action for violations of legislation created under

authority for both); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 245-46 (stating that section 2 of the Fifteenth Amendment and section 5 of the Fourteenth Amendment have been similarly interpreted); Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 73, 92 ("[T]he enforcement powers of each of the reconstruction amendments are coextensive."). *But cf.* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 376-77 (1994) (noting that the Fifteenth Amendment is enforceable against federal and state governments, whereas the Fourteenth Amendment is only enforceable against the states).

80. 384 U.S. at 652-56. In *Morgan*, New York voters challenged section 4(e) of the Voting Rights Act of 1965. *Id.* at 643. The Act prohibited voting restrictions based on an individual's inability to read or write if he or she had completed sixth grade in a Puerto Rican school that did not have primarily English instruction. *Id.* New York law required voters to be able to read and write English to register, but it could not enforce the law against Puerto Rican educated individuals under the federal statute. *Id.* at 643-44. The Court upheld the statute as a valid exercise of congressional power under section 5 of the Fourteenth Amendment. *Id.* at 658.

81. One theory on which the Court sustained section 4(e) was based on Congress's ability to identify and remedy equal protection concerns using judicially formulated standards. The Court stated that Congress could have rationally concluded that, by giving Puerto Ricans a political tool via the right to vote, section 4(e) provided a remedy to states' unconstitutional discriminatory treatment in supplying government services. *Id.* at 652; *see also* TRIBE, *supra* note 24, § 5-14, at 341 (discussing the Court's first theory in support of section 4(e)).

82. *Morgan*, 384 U.S. at 648. The Court's second theory for upholding section 4(e) gave Congress the power to conclude that New York's literacy requirement itself violated the Equal Protection Clause, despite the Court's earlier conclusion that such literacy tests did not violate the Equal Protection Clause. *Compare* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50-53 (1959) (holding that literacy requirements did not violate the Equal Protection Clause), *with Morgan*, 384 U.S. at 652-56 (upholding Congress's regulation of literacy tests because Congress concluded that they violated the Equal Protection Clause).

83. 383 U.S. 745 (1966).

Congress's section 5 powers.[84] The six Justices asserted that Congress could punish private conduct that interfered with Fourteenth Amendment rights, even if a state actor did not participate, if the regulation was reasonably necessary to fully protect those rights.[85] Under this formulation of the section 5 power, Congress could regulate private conduct even in the absence of state action that violated the Equal Protection Clause.

Congress's authority to identify conduct that violates the Fourteenth Amendment under judicially articulated standards of review and its ability to apply broad remedies to those violations is well established.[86] In contrast, congressional authority to assert that conduct violates the Equal Protection Clause when courts would not agree is uncertain. The Court has not relied on *Morgan*'s holding that Congress could create substantive rights beyond those that have been or would be judicially recognized to sustain any legislation since its original decision.[87] Similarly, the Supreme Court has not had an opportunity to revisit the six Justices' assertion in *Guest*, although the Court did reaffirm that position in dicta in a subsequent case.[88]

84. *Id.* at 782 (Brennan, J., concurring in part and dissenting in part). In *Guest*, the government indicted six defendants for conspiring to deprive a citizen of his right to access public facilities in violation of 24 U.S.C. § 241 (1964). *Id.* at 747 n.1. The majority opinion in *Guest* did not address whether state action was a prerequisite to regulation under section 5 because it concluded that the government's allegation of police action in this case was sufficient to deny the defendants' motion to dismiss the indictments. *Id.* at 756. Justice Brennan and five other Justices felt compelled to clarify that even if the government did not prove the alleged police action, the indictments should stand because section 5 empowered Congress to act against wholly private conduct if necessary to protect Fourteenth Amendment rights. *Id.* at 782. The six Justices explicitly rejected the *Civil Rights Cases*'s holding that required state action for congressional enactments under section 5. *Id.* at 782-83. Justice Brennan stated that the *Civil Rights Cases*'s holding "reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary; and it attributes a far too limited objective to the Amendment's sponsors." *Id.* at 783.

85. *Id.* at 782.

86. *See, e.g.*, *City of Rome*, 446 U.S. at 173-77 (holding that Congress could regulate conduct not violating the Equal Protection Clause to remedy a previously identified equal protection violation).

87. *See* Frickey, *supra* note 47, at 716 (noting that the Court has never relied on the *Morgan* power, although it has had opportunities to do so); *see also* P.F. Flores v. City of Boerne, 73 F.3d 1352, 1358-64 (1996) (challenging the constitutionality of the Religious Freedom Restoration Act), *cert. granted*, 117 S. Ct. 293 (1997).

88. District of Columbia v. Carter, 409 U.S. 418, 423-24 & n.8 (1973)

D. THE VIOLENCE AGAINST WOMEN ACT

In June 1990, Senator Biden proposed the Violence Against Women Act in response to "the escalating problem of violence against women."[89] After a heated four-year congressional,[90] executive,[91] and judicial[92] debate of the legislation's constitutionality, Congress passed the VAWA as part of the Violent Crime Control and Law Enforcement Act of 1994.[93] Subtitle C of the VAWA created a civil rights cause of action against the perpetrators of gender-based crimes.[94] Under the

("The Fourteenth Amendment itself 'erects no shield against merely private conduct . . .' [but that] is not to say . . . that Congress may not proscribe purely private conduct under section 5 of the Fourteenth Amendment.") (citing *Guest*, 383 U.S. at 762, 782-84; *Morgan*, 384 U.S. at 652).

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

90. Senators Thurmond and Hatch initially argued that the bill was unconstitutional, but withdrew their objections after Senate hearings. Victoria F. Nourse, *Where Violence, Relationship, and Equity Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 18 (1996).

91. The Bush administration's Department of Justice asserted that the civil rights remedy was unconstitutional. *Id.* (citing letter from Department of Justice to Chairman Joseph Biden 8 (Oct. 9, 1990)). The Clinton Department of Justice believed that the remedy was constitutional. *Id.* (citing *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 96 (1993) (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division)).

92. In 1992, Chief Justice Rehnquist stated that he feared that the VAWA's civil cause of action "could involve the federal courts in a whole host of domestic relations disputes." 138 Cong. Rec. 746, 747 (Mar. 19, 1992). The Judicial Conference also believed that the civil cause of action would impair federal courts' ability to handle their caseloads and would "needlessly disrupt long-established roles between the state and federal governments." *See* William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1148 (1996) (citing JUDICIAL CONFERENCE OF THE U.S. AD HOC COMM. ON GENDER-BASED VIOLENCE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE 8 (1991)). The Judicial Conference did not take a position on the 1993 version of the VAWA, but it did reiterate its previously stated concerns about the Act and the federalization of crime generally. *Id.* at 1148 n.46.

State court judges also opposed the VAWA in 1991 because they feared its use as a bargaining tool in divorce cases. *1991 Hearings*, *supra* note 15, at 315 (statement of the Conference of Chief Justices of the States).

93. Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered titles of U.S.C.).

94. The civil remedy portion of the Act states, in part:

> (c) Cause of action
>
> A person . . . who commits a crime of violence motivated by gender . . . 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.

VAWA's civil remedy, an individual who is the victim of a felony-level crime[95] that is due in part to an animus based on the victim's gender may recover compensatory damages, punitive damages, injunctive relief, declaratory relief, and attorney's fees in federal or state courts.[96]

Congress claimed authority to enact this new cause of action under the Commerce Clause and section 5 of the Fourteenth Amendment.[97] During Congress's four-year debate of the VAWA, it made extensive findings, cited numerous studies, and consulted a host of experts before determining that it had

> (d) Definitions
>
> For purposes of this section—
>
> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
>
> (2) the term "crime of violence" means—
>
> (A) an act or series of acts that would constitute a felony against the person . . . whether or not those acts have actually resulted in criminal charges, prosecution, or conviction . . . .

42 U.S.C. § 13981 (1994).

In addition to creating a new civil cause of action for gender-based crimes, the Act allows the Attorney General to provide grants to states to implement mandatory arrest programs, improve tracking of domestic violence cases, centralize handling of domestic violence cases among certain police, prosecutors and judges, coordinate computer tracking systems, strengthen legal advocacy for victims, educate judges about handling these cases, and improve victim service programs. *Id.* § 2101, 108 Stat. at 1932 (codified at 42 U.S.C. § 3796hh (1994)). The Act also strengthened penalties for certain sex crimes and required compensation for losses. *Id.* §§ 40502-05, 108 Stat. at 1945-48. For an overview of the VAWA's other provisions, see Bassler, *supra* note 92, at 1142-49.

95. The statute neither requires a criminal conviction, nor a criminal complaint, to give rise to this civil cause of action. 42 U.S.C. § 13981(e)(2) (1994). The alleged activity must only have the requisite elements of a felony to bring suit. *Id.* § 13981(d)(2)(a). If a crime would constitute a felony but for the perpetrator's relationship to the victim, the statute still creates a cause of action. *Id.* § 13981(d)(2)(B).

96. *Id.* §§ 1988(b), 13981(c), (d) (1994). When a plaintiff brings an action under the VAWA in state court, the defendant may not remove the case to federal court. 28 U.S.C. § 1445(d) (1994).

97. The VAWA states:

> (a) Purpose
>
> Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

42 U.S.C. § 13981(a).

constitutional authority to enact the civil rights provision.[98] Citing statistics about the prevalence of domestic violence and other abuses against women,[99] Congress asserted that gender-based crimes restrict movement, reduce employment opportunities, increase health expenditures, and reduce consumer spending, all of which affect interstate commerce and therefore justify regulation under the Commerce Clause.[100] Congress also claimed authority to create the civil remedy under section 5 of the Fourteenth Amendment because it found that state criminal justice systems were biased and discriminatory in their treatment of gender-based crimes and, therefore, violated the Equal Protection Clause.[101] For example, Congress found

98. In considering the VAWA between 1990 and 1994, Congress held no less than six hearings on the topic of violence against women. These hearings include: *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. (1993); *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. (1993); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. (1992); *1991 Hearings*, *supra* note 15; *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. (1990); *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong. (1990). Congress also relied heavily on the testimony of two law professors, Burt Neuborne and Cass Sunstein, in assessing the civil rights remedy's constitutionality. *See 1991 Hearings*, *supra* note 15, at 84-124 (statements of Professors Neuborne and Sunstein).

99. See *supra* note 15 and accompanying text (citing statistics on violence against women).

100. S. REP. NO. 103-138, at 54 (1993). The Conference report came to similar conclusions:

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

H.R. CONF. REP NO. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1853.

Congress estimated that $5 to $10 billion was spent each year for medical care, criminal justice, and other costs related to domestic violence. S. REP. NO. 103-138, at 41 (1993). Studies also reported that 50% of rape victims lost their jobs after the crime. *Id.* at 54.

101. The Senate Report highlighted the following findings:

> (4) existing bias and discrimination in the criminal justice system often deprives victims of gender-motivated crimes of equal protection of the laws and the redress to which they are entitled;
>
> . . . .
>
> (7) a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws . . .
>
> (8) victims of gender-motivated violence have a right to equal protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes.

S. REP. NO. 103-138, at 29 (1993); *see also* H.R. CONF. REP. NO. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1853-54 (discussing the failures of state criminal justice systems in addressing gender-based crimes). Congress also determined that "[t]he law enforcement response to the epidemic of violence against women has been inadequate." H. REP. NO. 103-395, at 27 (1993). Congress stated that its findings of inadequate response to gender-motivated crimes belie claims that state laws provide adequate remedies for the victims of these crimes. *Id.* Congress concluded that "[u]nder the 14th Amendment, there is no clearer case of Congress's power to legislate than when States have failed to provide equal rights." S. REP. NO. 103-138, at 55 (1993); *see also* S. REP. NO. 102-197, at 42-48 (1991) (discussing the inadequacies of state remedies for gender-biased crimes); W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 595-600 (1993) (describing the formal and informal barriers to equal treatment of gender-based crimes).

Numerous state reports that identified their own discriminatory treatment of gender-motivated violence bolstered the congressional findings. *See, e.g.*, *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 74 (1992) (statement of Margaret Rosenbaum, Asst. State Att'y, Miami, Fla.) (identifying police bias against domestic abuse cases); *1991 Hearings*, *supra* note 15, at 135-56 (statement of Gill Freeman) (reporting the identification of gender bias in Florida's criminal justice system).

102. S. REP. NO. 103-138, at 49 & n.52 (1993) (citing numerous state studies on gender-bias in state criminal justice systems).

103. S. REP. NO. 102-197, at 53 (1991).

104. H.R. CONF. REP. NO. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1801, 1853.

105. Congress noted that existing laws prohibited gender-based crimes in the workplace, but provided no similar protection in the home. S. REP. NO. 103-138, at 29 (1993). Congress also found numerous legal barriers to protection from these crimes, including: corroboration and utmost resistance rules in rape cases, spousal immunities for rape and battery, and jury instructions that questioned the victim's credibility. S. REP. NO. 102-197, at 44-45 (1991). Congress noted that "[i]n theory, [a rape victim] has certain criminal and civil remedies at her disposal" but found that "[i]n practice, few are able to use those remedies." *Id.* at 44. Furthermore, Congress determined that state and federal laws were inadequate to protect against the bias element of gender-

that police, judges, and prosecutors treated crimes affecting women less seriously than comparable crimes against men,[102] that "rape survivors must overcome problems of proof and local prejudice that other crime victims need not hurdle,"[103] and that state and federal laws did not give victims of gender-motivated violence the opportunity to vindicate their interests.[104] Congress also sought to remedy inadequate state laws[105] and rec-

ognize the importance of a victim's right to be free from gender-motivated violence in the absence of appropriate state recognition of that right.[106]

E. *DOE V. DOE*: UPHOLDING THE VAWA UNDER THE COMMERCE CLAUSE

Doe v. Doe was the first reported case addressing the constitutionality of the VAWA's civil rights remedy.[107] In *Doe*, the United States District Court for the District of Connecticut upheld the Act against a Commerce Clause challenge.[108] Because the court found that the Commerce Clause authorized Congress to enact the VAWA, it did not consider the defendant's Fourteenth Amendment argument.[109]

The *Doe* court considered whether Congress could rationally conclude that the VAWA's civil rights remedy regulated activity that substantially affected interstate commerce.[110] The court applied this deferential rational basis standard of review, rejecting the defendant's argument that *Lopez* required use of a less deferential standard.[111] Applying the rational basis standard, the court concluded that the statistical, medical, and economic data compiled by Congress provided it with a rational basis for concluding that gender-based crimes substantially affected interstate commerce.[112] The court found that the VAWA regulated an activity that impacted interstate commerce as much as the Agricultural Adjustment Act did in *Wickard*[113] and

based crimes. H.R. CONF. REP. NO. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. at 1853.

106. The Act provides "a special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victims' civil rights." S. REP. NO. 103-138, at 50 (1993).

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

108. *Id.* at 617.

109. *Id.* at 612 n.5.

110. *Id.* at 612. The *Doe* court limited its analysis to the third category of regulable activities identified in *Lopez* because the defendant relied on that category for his objection to the Act. *Id.*

111. *Id.* at 612-13. The court stated that its review was limited to determining whether "a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 612. The court acknowledged that its review, though independent, would consider congressional findings. *Id.* Ultimately, the court rejected defendant's argument to use a more searching standard of review, stating that *Lopez* reaffirmed the *Hodel* rationality test. *Id.* at 613 (citing United States v. Lopez, 115 S. Ct. 1624, 1629 (1995)).

112. *Id.* at 615.

113. *Id.* at 614. The court stated that the repetitive impact of women limiting their participation in the workplace would result in an impact on interstate commerce as substantial as the growing of wheat in *Wickard*. *Id.*

did not require the court to "pile inference upon inference" to reach that conclusion.[114] The court also rejected the defendant's argument that the Act infringed on traditional state police powers and federalized criminal, family, and state tort law.[115] The court stated that the VAWA did not encroach on these areas of state control, but rather complemented state initiatives in these areas and ensured full protection of civil rights.[116] After determining that Congress had a rational basis for enacting the VAWA, the court found the Act "reasonably adapted to its intended end."[117] The court agreed with Congress's findings that state and federal laws inadequately protected against gender-based crimes and that biases existed in the criminal justice system against victims of gender-based crime.[118] Based on these findings, the court concluded that the VAWA constituted a reasonable measure designed to deter and punish perpetrators of gender-based crimes and, therefore, was reasonably adapted to a legitimate constitutional end.[119]

II. *BRZONKALA*: REJECTING CONGRESSIONAL AUTHORITY TO ENACT THE VAWA

In *Brzonkala v. Virginia Polytechnic and State University*,[120] the District Court for the Western District of Virginia held that Congress lacked constitutional authority to enact the VAWA under either the Commerce Clause or section 5 of the Fourteenth Amendment.[121] Based on these findings, the court dismissed the plaintiff's civil action against the men she ac-

114. *Id.* The defendant argued that Congress's justifications for enacting the VAWA were similar to the rationales dismissed in *Lopez*, namely the "cost of crime" and "national productivity" arguments. *Id.* at 613. The court rejected this argument because it had already concluded that *Lopez* did not alter the standard of review and found that Congress had demonstrated a need for the regulation that satisfied this standard. *Id.* The court also stated that the defendant based his argument on selective Supreme Court statements taken out of context. *Id.* (citing United States v. Wilson, 73 F.3d 675, 685 (11th Cir. 1995)).

115. *Id.* at 615-16.

116. *Id.* at 616.

117. *Id.*

118. *Id.*; *see supra* notes 101-106 and accompanying text (discussing congressional findings regarding the need for the VAWA).

119. *Doe*, 929 F. Supp. at 616.

120. 935 F. Supp. 779 (W.D. Va.), *appeal docketed*, No. 96-2316 (4th Cir. Sept. 24, 1996).

121. *Id.* at 801.

cused of sexually assaulting her and struck down the VAWA civil rights remedy.[122]

A. THE VAWA: THE GFSZA'S COMMERCE CLAUSE TWIN

The *Brzonkala* court first concluded that neither of the first two categories of regulable activities identified in *Lopez*[123] could sustain the VAWA because it did not regulate the use of channels of interstate commerce or instrumentalities of interstate commerce.[124] The court analyzed the GFSZA under the third prong of regulable activities, compared the characteristics of the GFSZA and the VAWA, and concluded that the latter was also unconstitutional.[125] Although the court recognized that the VAWA differed from the GFSZA in its civil nature, abundant legislative history, and fewer steps of causation,[126] it deemed these differences insignificant.[127] First, the court dismissed the usefulness of congressional findings supporting the VAWA, emphasizing the court's need to make an independent evaluation of the regulation's nexus to interstate commerce rather than relying on Congress's assertions and conclusions.[128] Second, the court found irrelevant the civil/criminal distinction between the VAWA and the GFSZA because the VAWA also involved activities criminal in nature.[129] Finally, the court found that the chain of causation from the regulated activity to the effect on commerce was only one step less in the VAWA.[130]

122. *Id.*

123. *See supra* notes 33-34 and accompanying text (discussing the first two categories of regulable activity identified in *Lopez*).

124. *Brzonkala*, 935 F. Supp. at 786. The court admitted that women and their abusers often travel between states, but concluded that the Commerce Clause required more than this to justify federal regulation under the second category of regulable activities. *Id.*

125. *Id.* at 786-93.

126. *Id.* at 789.

127. *Id.*

128. *Id.* The court recognized that congressional findings were helpful in determining a regulated activity's nexus to interstate commerce, but said such findings were not required. *Id.* The court stated that if the *Lopez* Court had considered such findings important, it could have considered the congressional findings made after the GFSZA's passage. *Id.* The court claimed that the *Lopez* Court did not need to consider those findings because it felt it had sufficient information to make its decision without them. *Id.*

129. *Id.* at 790.

130. *Id.* The court compared Congress's arguments in support of the VAWA to those advanced in *Lopez*. *Id.* The court noted that the GFSZA regulated an activity that could lead to violent crime, while the VAWA regulated an activity that was itself a violent crime. *Id.* The court dismissed this distinction, stating that the difference was "not enough to apply the commerce power in the case at hand" because the "step from possession of a firearm in schools to the commission of a violent crime is a small step." *Id.*

The court criticized use of a "steps test" and stated that the most important consideration was the proximity of the regulated activity to interstate commerce.[131] The court then determined that gender-based crimes were as remote from interstate commerce as was the possession of a gun in a school zone.[132]

While finding the statutes' differences insignificant, the court found the similarities convincing.[133] The court noted that the statutes were similar in that they were both criminal, noneconomic, lacked a jurisdictional requirement, were remotely connected to commerce, and were supported by rationales that would result in excessive congressional power.[134] The court determined that the VAWA did not regulate an economic activity because it regulated local criminal activity, not the "growth of crops, the shipment of goods, or other similar economic activities."[135] The court found the VAWA's noneconomic character significant because it noted that *Lopez* focused heavily on whether legislation regulated economic activity.[136] The court asserted that "*Lopez* teaches that cases in which the statute at issue regulates intrastate activity which is economic in nature are analyzed differently from cases involving noneconomic intrastate activity."[137] Consequently, the court stated that *Wickard* and other cases addressing regulations of economic activity were not applicable to the VAWA because of its non-economic character.[138] The court also noted that the VAWA lacked a jurisdictional element that required the regulated conduct to somehow involve interstate commerce.[139] Fi-

131. *Id.*

132. *Id.* at 791.

133. *Id.*

134. *Id.* at 789.

135. *Id.* at 791.

136. *Id.* The court noted that whether a regulation controls economic intrastate activity is a valid consideration after *Lopez*. *Id.* The court observed that *Doe* upheld the VAWA against a Commerce Clause challenge and criticized its comparison of the VAWA to the regulation in *Wickard*. *Id.* The court stated that comparison of the Court's treatment of the *Wickard* regulation to the VAWA was inappropriate because *Wickard* involved an economic activity whereas the VAWA did not. *Id.*

137. *Id.*

138. *Id.* at 791-92.

139. *Id.* at 792. The court gave examples of commerce-based regulations that contained a jurisdictional requirement, including the Mann Act and Title

nally, the court concluded that upholding the VAWA because of the effect gender-based crime has on the national economy would permit Congress to reach family and most criminal matters because they too eventually affect the national economy.[140] The court stated that this rationale would impermissibly alter the balance of power between the federal and state governments.[141] After comparing the statutes, the court concluded that the VAWA suffered from the same fatal flaws as the GFSZA and rejected plaintiff's arguments to sustain the VAWA under the Commerce Clause.[142]

B. TARGETING THE WRONG CONDUCT TO REMEDY A LEGITIMATE EQUAL PROTECTION CONCERN

The *Brzonkala* court also found Congress's Fourteenth Amendment section 5 argument unpersuasive.[143] While acknowledging that private conduct might have sufficient ties to the state to bring it under the state action requirement of the Equal Protection Clause, the court stated that the Amendment only reaches conduct involving state action.[144] The court acknowledged the *Guest* assertion that section 5 allowed Congress to reach purely private conduct, but dismissed that argument because the court deemed it contrary to the Fourteenth Amendment's plain language and the *Civil Rights Cases*.[145]

VII of the Omnibus Crime Control and Safe Streets Act of 1968. *Id.* The court noted that it was unclear whether a jurisdictional requirement was mandatory, but stated that Congress frequently used such requirements in similar legislation. *Id.*

140. *Id.* The court stated that the plaintiff mistakenly interchanged "effects on the national economy" with "effects on interstate commerce" in her assertion that gender-based crimes have sufficient impact on interstate commerce to justify federal regulation. *Id.* The court noted that the two are not the same, even though something that affects the national economy eventually affects interstate commerce. *Id.* The court said that such a chain of causation alone was not sufficient to bring a statute within the scope of the commerce power. *Id.*

141. *Id.* at 793.

142. *Id.*

143. *Id.* at 801.

144. *Id.* at 793-94. The court noted that even though private conduct may be sufficiently linked to state action, some state involvement is required, even if it is tangential. *Id.* at 794.

145. *Id.* (citing The Civil Rights Cases, 109 U.S. 3, 11 (1883)). The court claimed that a prior Supreme Court case required that lower courts not assume that the Supreme Court's contrary indications implicitly overruled precedents requiring state action. *Id.* (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). The court also noted that cases after *Guest* cited the *Civil Rights Cases*'s holding with approval as

In order to withstand a constitutional challenge, the court stated that legislation enacted under section 5 must use legitimate means to remedy a legitimate equal protection concern.[146] The court identified the Act's purposes as attacking gender-motivated crimes and remedying biases in state criminal justice systems.[147] The court held that the purpose of attacking an individual's gender-based crime lacked sufficient ties to the state to create a legitimate equal protection concern because the perpetrators of those crimes do not act pursuant to a state granted right or privilege.[148] Moreover, the court concluded, these crimes could not be attributed to the states because states prohibit these crimes under their criminal and tort laws.[149]

In contrast, the court found the purpose of remedying discrimination in state criminal justice systems to constitute a legitimate equal protection concern.[150] After making this determination, the court examined whether the VAWA provided an appropriate remedy to that concern.[151] The court found that the Act did not provide a legitimate remedy to this concern because it did not stop, undo, or punish the state's equal protection violation.[152] Because the Act created a cause of action against private conduct and not for states' discriminatory actions, the court determined that it could not sustain the Act as a legitimate remedy to state discrimination.[153] In addition, the court found that the remedy was both over- and underbroad. The court concluded that the Act's remedy was overbroad because it created a cause of action for victims who did not suffer

recently as 1982. *Id.* (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982)). *Morgan* was not applicable to the VAWA, the court reasoned, because it involved congressional action against the state, whereas the VAWA acts against purely private conduct. *Id.* at 795.

146. *Id.* at 796-97.

147. *Id.* at 797.

148. *Id.*

149. *Id.* (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 938 (1982)). The court stated, "Certainly the state is not responsible in any relevant sense for individuals who commit violent crimes against women." *Id.* The Court concluded that the perpetrator's gender-motivated crime constituted one act of discrimination, and the state's discriminatory enforcement of its laws against these crimes constituted a separate discriminatory act. *Id.*

150. *Id.* at 800. The court noted that states' differential treatment of gender-based crimes might stem from gender discrimination and, therefore, create an equal protection concern. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

an equal protection violation by the state.[154] The court determined that the remedy was underbroad because it did not provide a cause of action for female victims of non-gender-based crimes who were denied equal protection by a state's biased criminal justice system.[155] Because the court determined that the VAWA remedied conduct not giving rise to an equal protection concern and was over- and underbroad, the court concluded that the Act did not constitute a valid use of Congress's section 5 powers.[156]

III. THE VAWA: A LEGITIMATE USE OF CONGRESSIONAL POWER

A. VAWA'S INSUFFICIENT NEXUS WITH INTERSTATE COMMERCE

1. Applicable Category of Regulable Activity

Although Congress may regulate three categories of activities under the Commerce Clause,[157] the VAWA is only potentially sustainable as a regulation of activity having a substantial impact on interstate commerce.[158] In addition to finding that gender-based crimes substantially affect interstate commerce, Congress found that high incidents of gender-motivated violence reduced women's willingness to travel,[159] which could bring the Act into the category of regulations of persons in interstate commerce.[160] That argument, however, is identical to the government's argument in *Lopez*,[161] which the

154. *Id.* The court used the example of a woman who was raped and whose perpetrator received the maximum penalty. *Id.* The court noted that this woman, who did not suffer from a denial of her equal protection rights, could still recover under the Act. *Id.*

155. *Id.*

156. *Id.* at 800-01.

157. *See supra* notes 33-35 and accompanying text (discussing the categories of regulable activity identified in *Lopez*).

158. *See supra* note 35 and accompanying text (identifying the third category of regulable activity under the Commerce Clause).

159. *See supra* note 100 (noting that Congress found that gender-based crimes deter interstate travel).

160. *See supra* note 34 and accompanying text (discussing the second category of regulable activities identified in *Lopez*).

161. Brief for the United States at 18, United States v. Lopez, 115 S. Ct. 1624 (1994) (No. 93-1260) ("[V]iolent crime affects interstate commerce by reducing the willingness of other individuals to travel to areas within the country that are perceived to be unsafe.").

Court summarily rejected.[162] Accepting this argument could justify federal regulation of "all violent crime[s] . . . regardless of how tenuously they relate to interstate commerce."[163] As a result, courts should reject arguments to sustain the VAWA as a regulation of persons in interstate commerce.[164]

2. Judicial Review Under the Commerce Clause

Lopez mandates that courts independently evaluate whether Congress's assertion that gender-based crimes substantially affect interstate commerce was rational.[165] Courts should consider and give weight to findings supporting Congress's argument that gender-based crimes have a substantial effect on interstate commerce,[166] but should decide whether those purported links in fact provide the requisite nexus to commerce to permit regulation under the Commerce Clause.[167]

3. Regulation of Noneconomic Activities

The *Brzonkala* court correctly determined that the VAWA does not regulate an economic or commercial activity. *Lopez* dictates that regulations of intrastate activities must involve a commercial or economic activity, or contribute to an economic regulatory scheme that would be undercut in the absence of the regulation, to "be sustained under . . . cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, sub-

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

163. *Id.* at 1632.

164. Both courts that have addressed the VAWA's constitutionality under the Commerce Clause have only analyzed it as potentially regulating an activity substantially affecting interstate commerce. *See supra* notes 110, 124 and accompanying text (noting that both courts did not analyze the VAWA under the first or second categories of regulable activities identified in *Lopez*). For an argument that the VAWA is sustainable as a regulation of persons in interstate commerce, see Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After* Lopez, 96 COLUM. L. REV. 1876, 1935-39 (1996).

165. *See supra* note 62 and accompanying text (noting that the *Lopez* Court considered whether the gun possession in fact substantially affected interstate commerce).

166. *See supra* text accompanying note 51 (noting that courts consider congressional findings when reviewing a statute's constitutionality under the Commerce Clause).

167. *See supra* note 62 and accompanying text (stating that the Court in *Lopez* undertook an independent evaluation of whether gun possession substantially affected interstate commerce).

stantially affects interstate commerce."[168] The VAWA fails to meet this requirement because gender-based crimes do not involve a "commercial" transaction or "economic" activity, as the Court has used those terms.[169] Rather, gender-based crimes are similar to possession of a gun in a school zone, which the Court has defined as a noneconomic activity.[170] The gender-motivated criminal does not produce goods, purchase services, or take part in any sort of economic or commercial transaction that the Court has identified as being within the scope of congressional power to regulate under the Commerce Clause.[171] In addition, there is no national market for gender-motivated violence like there is for wheat and other products and services regulated under the Commerce Clause.[172] While an extremely broad definition of "commerce" or "economic" could encompass gender-based crimes,[173] the *Lopez* Court intended a more restrictive use of these terms.

The majority in *Lopez* rejected the view that Congress could have concluded that schools were a commercial enterprise because this reasoning would impose no limit on the definition of "commercial" and would allow regulation of every aspect of local schools.[174] Similarly, an argument that gender-based crimes are economic because they eventually impact interstate commerce would allow Congress to regulate nearly any criminal activity because they cause individuals or society harm. Situations where the Court upheld regulations of criminal activities are distinguishable because they involved activities that themselves had a commercial or economic character, such as credit transactions.[175] The Court did not intend a broad definition of economic activities that would encompass

168. United States v. Lopez, 115 S. Ct. 1624, 1631 (1995).

169. *See id.* at 1630 (listing intrastate activities involving economic activity).

170. *See supra* notes 48-49 and accompanying text (discussing the Court's holding that the GFSZA did not regulate an economic activity).

171. *See Lopez*, 115 S. Ct. at 1630 (listing regulated intrastate activities involving economic activity that the Court has sustained under the commerce power).

172. *See supra* notes 39-40 and accompanying text (discussing Wickard v. Filburn, 317 U.S. 111 (1942)).

173. *See supra* note 49 (discussing the Court's statement that a broad definition of "commercial" could include "any activity").

174. *See supra* note 49 (discussing the Court's treatment of Justice Breyer's dissenting arguments).

175. *See, e.g.*, Perez v. United States, 402 U.S. 146, 157 (1971) (upholding regulation of extortionate credit transactions).

gender-based violence. The *Brzonkala* court, therefore, correctly concluded that gender-based crimes did not constitute an economic activity.

4. The VAWA's Less Than Substantial Effect on Interstate Commerce

Because gender-based crimes do not constitute an economic activity, cases addressing the constitutionality of regulations controlling intrastate economic activities are inapplicable.[176] Consequently, Congress cannot rely on cases like *Wickard* to establish gender-based crimes' nexus to interstate commerce. Even if the nexus between gender-motivated violence and interstate commerce could justify congressional regulation if a court did aggregate its effects, without aggregation the substantiality of each individual crime's effect on interstate commerce is insufficient to meet the substantiality requirement for Commerce Clause enactments. While a gender-based crime may cause the victim to stop working, reduce her consumption of goods, or cause her to seek medical attention, those effects, considered in isolation from people similarly situated, do not have a "substantial impact" on interstate commerce when compared to activities or enterprises previously regulated and sustained under the Commerce Clause.[177] Interpreting the substantial effects test to include one victim's potential impact on interstate commerce would significantly constrain the requirement and would contradict the Court's assertion in *Lopez* that required the effect on interstate commerce to be "substantial."[178] Accepting such an argument would allow Congress to "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."[179]

176. *See Lopez*, 115 S. Ct. at 1631 (stating that regulations of noneconomic intrastate activities cannot be sustained under cases arising out of or connected with commercial transactions).

177. All of the regulations cited in *Lopez* with approval as appropriate regulations of intrastate economic activity involved regulation of whole industries, similarly situated restaurants or motels nationwide, nationwide loansharking, or other large enterprises. *Id.* at 1630. None of the enactments involved regulation of an individual person, whose act, viewed in isolation, was found to substantially affect interstate commerce.

178. *See supra* note 45 (noting that the Court clarified that a "substantial" effect on interstate commerce was necessary to justify regulation under the Commerce Clause).

179. *Lopez*, 115 S. Ct. at 1630 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)).

The VAWA not only fails to regulate an activity having a substantial effect on interstate commerce, but Congress's asserted nexus between gender-motivated violence and interstate commerce is too tenuous to justify congressional regulation. As in *Lopez*, the implications of accepting Congress's rationales in support of the VAWA create significant federalism concerns.[180] In fact, Congress used some of the same rationales rejected in *Lopez* to support the VAWA.[181] Congress's assertions that gender-based crimes reduce employment opportunities, restrict movement, and reduce consumer spending are as objectionable as the arguments rejected in *Lopez* because they, too, could justify federal regulation of areas traditionally controlled by the states. One could say that nearly any criminal activity has those effects,[182] but as the Court stated in *Lopez*, such effects are too remote from interstate commerce to justify congressional regulation without a further connection to interstate commerce.[183] The only difference between the GFSZA's rationales and those argued in support of the VAWA is that the former relied on a potential violent crime, whereas the latter relied on an actual violent crime.[184] This difference is insignificant because either rationale would allow Congress to intrude on the traditional state power to regulate crime.[185] While the VAWA is arguably not as intrusive as the GFSZA,[186] the Court's concern in *Lopez* was about the implications of accepting the asserted rationales in support of legislation.[187] Because the VAWA regulates noneconomic activities, lacks a jurisdictional requirement that would tie gender-based crimes to interstate commerce, and relies on rationales that could raise significant federalism concerns, courts should not sustain the Act under Congress's Commerce Clause authority.

180. *See supra* notes 55-59 and accompanying text (discussing the Court's concern in *Lopez* about the government's arguments in support of the GFSZA).

181. *Compare supra* note 100 (citing the House report claiming gender-based crimes have a substantial impact on interstate commerce because they "diminish . . . national productivity"), *with supra* notes 55-56 and accompanying text (rejecting the government's national productivity argument in support of the GFSZA).

182. For instance, locales with high crime rates are less attractive and reduce travel and employment in those areas.

183. *See supra* notes 55-56 and accompanying text (rejecting the government's national productivity argument).

184. *Compare supra* text accompanying note 55 (discussing the government's national productivity argument), *with supra* note 100 and accompanying text (discussing Congress's asserted bases for implementing the VAWA under the Commerce Clause).

185. *See supra* text accompanying note 58 (discussing the Court's rejection of the cost of crime rationale).

186. The VAWA does not supplant state criminal law as the GFSZA did, but it does regulate criminal activity. Arguably, the Act also interferes with state family law. *See supra* note 92 (discussing the judiciary's objections to the VAWA's civil rights remedy because of its intrusion on state family law).

B. CONGRESSIONAL POWER TO ATTACK GENDER-BASED CRIMES UNDER SECTION 5

1. Identifying an Equal Protection Concern

Congress stated that its purpose in enacting the VAWA was to "protect the civil rights of victims of gender motivated violence."[188] To demonstrate a need for this legislation, Congress compiled an extensive record exposing the biases, inadequacies, and rampant discrimination in the way state criminal justice systems treat gender-based crimes.[189] These problems constitute state action because the state or state officials are perpetrating discrimination through their differential application of state laws.[190] Because the discriminatory conduct that Congress identified provides support for its conclusion that states are discriminating on the basis of gender, courts would inquire whether the states were advancing an important governmental interest through this differential treatment.[191] No state, however, has advanced an important reason for its discriminatory and inadequate enforcement of laws proscribing gender-based crimes. States have even acknowledged that they have systemic problems that prevent them from adequately addressing these crimes.[192] The *Brzonkala* court,

187. *See Lopez*, 115 S. Ct. at 1632 ("[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate."); *see also supra* note 59 (noting that the Court focused on the ramifications of accepting the government's arguments).

188. *See supra* note 97 (quoting the VAWA's purpose statement).

189. *See supra* notes 101-104 and accompanying text (reviewing Congress's findings regarding biases, inadequacies, and discrimination in state criminal justice systems).

190. *See supra* note 68 and accompanying text (noting the Equal Protection Clause only protects individuals from discriminatory state acts).

191. *See supra* note 67 and accompanying text (stating that gender-based distinctions require an important governmental interest).

192. *See supra* notes 101-102 (referencing state studies that demonstrated state discrimination and inadequate treatment of gender-based crimes).

therefore, properly concluded that a legitimate equal protection concern exists regarding states' differential treatment of gender-based crimes.[193]

Although the Supreme Court has held that section 5 allows Congress to define conduct that violates equal protection even when the courts would disagree,[194] Congress did not need to rely on this broad reading of its power to enact the VAWA.[195] Congress's finding of discriminatory state treatment of gender-motivated crimes was sufficient to satisfy judicial standards for identifying equal protection violations because states cannot identify an important governmental interest served by their gender-based discrimination.[196] Since Congress made extensive findings demonstrating state discrimination and applied judicially created standards to identify an equal protection concern, its conclusions are entitled to judicial deference.[197]

2. The Breadth of Congressional Remedies Under Section 5

While the *Brzonkala* court recognized that Congress had identified a legitimate equal protection concern in states' differential treatment of gender-based crimes, it determined that Congress's remedy did not sufficiently address that concern.[198] The court was incorrect, however, because the VAWA provides a remedy to states' deprivations of equal treatment by providing the victim with her day in court independent of the states' discriminatory systems, compensating victims for their injuries, deterring perpetrators from committing acts that are causally related to the states' equal protection violations, and providing "a special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victim's civil rights."[199] Although the Act does not ensure that perpetrators of gender-motivated violence will face criminal sanctions, it vindicates victims' interests independent of the states' discriminatory systems and, therefore, provides victims with a remedy to states' equal protection violations.

The *Brzonkala* court's assertion that the Act should have targeted the states who were violating the Equal Protection Clause is not supported by precedent, fails to recognize the breadth of congressional power to formulate remedies, and impermissibly supplants the court's judgment for that of Congress. Although the VAWA's civil remedy does not directly attack the states' discrimination, there is no precedent that imposes such a limitation on Congress's choice of remedies. In fact, the Supreme Court has repeatedly held that Congress can target conduct that does not violate the Constitution if the regulation provides an appropriate remedy to an equal protection concern.[200] The VAWA's civil rights remedy is analogous to the regulation upheld in *City of Rome* because they both target conduct that does not violate the Constitution and both provide a remedy for a congressionally identified equal protection concern.[201] While Congress could have employed several potential remedies to address this equal protection concern, its choice was entitled to substantial deference if the court could "perceive a basis upon which the Congress might resolve the conflict as it did."[202] For example, Congress might have believed that creating a cause of action against the states was imprudent because it could disturb prosecutorial discretion if victims threatened to sue the state regardless of how strong their cases were against alleged perpetrators.[203] Instead of

193. *See* Brzonkala v. Virginia Polytechnic and State Univ., 935 F. Supp 779, 800 (W.D. Va.) (recognizing a legitimate equal protection concern in states' differential treatment of gender-based crimes), *appeal docketed*, No. 96-2316 (4th Cir. Sept. 24, 1996).

194. *See supra* note 82 and accompanying text (noting Congress's ability to define substantive rights under its section 5 powers).

195. *See supra* note 87 and accompanying text (noting that Congress's rights-creating power under *Morgan* is questionable).

196. *See supra* note 67 and accompanying text (describing the standard applied to classifications based on gender).

197. *See supra* note 74 and accompanying text (noting the deference given to congressional determinations of constitutionality when applying court-made standards).

198. *See supra* text accompanying notes 152-153 (stating that the *Brzonkala* court found that the VAWA did not remedy the equal protection concern).

199. *See supra* notes 101-106 and accompanying text (identifying the problems Congress sought to address with the VAWA's civil cause of action).

200. *See supra* note 76 and accompanying text (noting that Congress can regulate constitutionally permissible conduct to remedy an equal protection concern).

201. *See supra* notes 77-79 and accompanying text (discussing *City of Rome*).

202. Katzenbach v. Morgan, 384 U.S. 641, 653 (1966); *see also supra* notes 74-76 and accompanying text (discussing the deference given to Congress's determination of when an equal protection violation exists and how to remedy it).

203. *See* Brief for Intervenor-Appellant United States at *14, Brzonkala v. Virginia Polytechnic and State Univ., 935 F. Supp. 779 (W.D. Va.) (No. Civ. A. 95-1358-R) (stating that a cause of action against the state or state officials "would fly in the face of prosecutorial immunity"), *appeal docketed*, No. 96-2316 (4th Cir. Sept. 24, 1996) (visited Mar. 17, 1997) <http://www.soconline.org/

using this extremely intrusive remedy, Congress chose to create a private cause of action that defends victims' interests against the states' discriminatory systems and devoted $1.6 billion to help states improve those systems and services to victims of these crimes.[204] Because Congress chose a collateral remedy that addresses an equal protection concern instead of more intrusive alternatives, courts should view Congress's choice as a rational one and sustain the VAWA's civil rights remedy under their deferential review of Congress's constitutional authority to enact remedial legislation.

3. Constitutional Limits on Section 5 Authority

While the Supreme Court has never endorsed or refuted use of the section 5 power to regulate private conduct as a remedy to state equal protection violations,[205] Supreme Court decisions and policy rationales provide support for such a use of the section 5 power. Allowing Congress to regulate private conduct does not impermissibly intrude on state police powers because the Fourteenth Amendment empowers Congress to interfere with state sovereignty to enforce its guarantees.[206] That authority, though not absolute, justifies creating a federal civil cause of action against perpetrators of gender-based crimes because the federal government is the principal enforcer of civil rights and may implement whatever regulations are "necessary" to protect those rights.[207] Allowing Congress to regulate private conduct to remedy an equal protection concern would not create an unlimited abrogation of state police power because Congress may only regulate private conduct to remedy an identified state equal protection violation.[208] This case presents an even stronger justification for congressional regulation of private conduct because it involves public and private invidious

LEGAL/BRZONKALA/111896.html> [hereinafter Brief for United States].

204. *See supra* notes 17, 94 and accompanying text (discussing the Act's civil rights remedy and other provisions to help states remedy their treatment of gender-based crimes).

205. The Supreme Court's holding in the *Civil Rights Cases* is distinguishable from the present case because Congress identified a state violation of equal protection and sought to remedy that violation with the VAWA. *See supra* note 68 (discussing the *Civil Rights Cases*).

206. *See supra* note 75 (discussing Congress's ability to subvert federalism principles to enforce the Amendment's guarantees).

207. *See supra* note 75 (discussing the breadth of congressional power to remedy equal protection violations).

208. *See supra* notes 63-68 and accompanying text (discussing equal protection violations).

discrimination against a protected class.[209] Moreover, allowing Congress to create a private cause of action to promote civil rights in these limited situations is equally, if not less, intrusive than Congress's already recognized power to overrun state immunity in such situations.[210] Instead of creating a cause of action that directly impinges on state sovereignty, the VAWA provides a supplemental remedy that minimally interferes with state interests.

The Court's recognition of Congress's power to regulate purely private conduct that interferes with Fourteenth Amendment rights provides additional support for the proposition that Congress may regulate private conduct to enforce Fourteenth Amendment rights when the state's conduct causes the deprivation.[211] Allowing Congress to regulate private conduct to remedy a state's identified violation of the Equal Protection Clause presents fewer constitutional concerns than does regulation of any private activity that might interfere with Fourteenth Amendment rights. In the latter situation, Congress could regulate numerous private acts that interfere with a protected right, even in the absence of state misconduct. In the former situation, Congress could regulate private conduct only after it identified a state's violation of equal protection rights. If the federal government can regulate private conduct in the absence of state misconduct, it should also have the authority to regulate private conduct if it provides an appropriate remedy to an identified state equal protection deprivation. Even if the Court rejects the *Guest* proposition that Congress can regulate private conduct that interferes with Fourteenth Amendment rights,[212] the Court decisions and policy rationales mentioned above provide support for Congress's ability to reach private conduct if appropriate to remedy a state's equal protection violation.

209. *See supra* note 67 and accompanying text (noting that gender classifications are subject to intermediate scrutiny); *cf.* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (noting the importance of limiting federal causes of action to specific activities, such as class-based invidious discrimination, to avoid constitutional problems).

210. *See supra* note 75 (noting Congress's ability to override state sovereign immunity for Fourteenth Amendment violations).

211. *See supra* notes 84, 88 and accompanying text (discussing United States v. Guest, 383 U.S. 745 (1966), and District of Columbia v. Carter, 409 U.S. 418 (1973)).

212. *See supra* text accompanying note 88 (discussing the questionable status of the six Justices' assertion in *Guest*).

The *Brzonkala* court also stated that the VAWA was both over- and underbroad.[213] The court's assertion that the VAWA is underinclusive is accurate because the Act does not provide a cause of action for victims of non-gender-based crimes who suffer from unequal state treatment. Congress's findings support the conclusion that state criminal justice systems are biased in enforcing laws protecting women from violent crimes that are both gender and non-gender motivated.[214] While the court's observation is accurate, it does not render the Act unconstitutional, because state or federal legislation need not correct all identifiable problems in one step.[215] As the Supreme Court has noted, legislatures may "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[216]

The court's observation that the statute is overbroad is also accurate because the Act provides a cause of action for victims who do not suffer from state discrimination. This also does not render the statute unconstitutional. Congress made substantial findings justifying its decision not to require each victim of gender-motivated violence to show that the state treated him or her unfairly.[217] Congress is entitled to significant deference in its assessment of appropriate methods for remedying equal protection violations[218] and may implement

213. *See supra* notes 154-155 and accompanying text (explaining why the *Brzonkala* court believed the VAWA was over- and underbroad).

214. *See supra* notes 101-106 and accompanying text (discussing Congress's rationales for enacting the VAWA under its section 5 power). For instance, inadequate state enforcement of rape laws is not dependent upon whether the perpetrator harbored animus towards the victim's gender. Many of Congress's findings support the conclusion that the criminal justice system treats crimes against women differently, not just gender-based ones.

215. *See, e.g.*, Semler v. Oregon State Bd. of Dental Exam'rs, 294 U.S. 608, 610 (1935) (stating that state legislation need not "strike all evils at the same time"); Roschen v. Ward, 279 U.S. 337, 339 (1929) (stating that "[a] statute is not invalid under the Constitution because it might have gone farther than it did").

216. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

217. As the United States noted in its brief supporting the VAWA, "Congress found a systemic failure to provide equal protection and enacted a systemic solution: a supplemental federal remedy to respond to the failings of the state systems. The remedy crafted by Congress accords with the nature of its findings." Brief for United States, *supra* note 203, at *15.

218. *See supra* note 75 and accompanying text (discussing the deference given to Congress's choice of remedy for equal protection violations).

overbroad prophylactic rules to address those violations.[219] The VAWA's remedy is analogous to the one upheld in *City of Rome*, which supported overbroad remedies when Congress demonstrated the pervasive nature of state discrimination.[220] Congress identified the pervasive nature of inadequate and biased enforcement of laws prohibiting gender-based crimes throughout the country and determined that a civil rights remedy for all victims, regardless of whether they could prove that they actually suffered from state discrimination, provided the best remedy to that problem. Congress's ability to impose overbroad regulations to remedy equal protection violations and the judicial deference given to Congress's choice of those remedies support a conclusion that the VAWA's overbreadth does not create a constitutional violation.

CONCLUSION

The VAWA's civil rights remedy provides a long overdue recognition of victims' rights to be free from gender-motivated violence. Numerous studies reveal the prevalence of gender-motivated violence and expose the inadequate and discriminatory response from state criminal justice systems. These studies demonstrate that gender-based crimes are treated less seriously and result in fewer prosecutions and convictions than similar non-gender motivated violent crimes. Stereotypes about victims of gender-motivated violence and insensitive police, prosecutors, and judges make securing justice even more difficult. The VAWA seeks to remedy these inequities by creating a private civil cause of action for women to vindicate their interests and deter potential criminals outside of the biased and discriminatory state criminal justice systems.

In *Brzonkala v. Virginia Polytechnic and State University*, the court held that Congress did not have authority to enact the VAWA under the Commerce Clause or section 5 of the Fourteenth Amendment. While the court reached the correct conclusion regarding Congress's authority under the Commerce Clause, it failed to recognize that Congress possessed authority to enact the VAWA under section 5. Future courts

219. *See supra* note 76 (noting Congress's ability to enact overbroad regulations to remedy equal protection concerns).

220. *See supra* note 78 and accompanying text (noting that Rome did not have discriminatory intent, but the Court upheld application of the overbroad remedy nonetheless).

propriate remedy because it provides an protection concern, without violating the VAWA under section 5 to constitutional limitations while vindicating the absence of appropriate state remedies. Future courts should therefore recognize Congress's ability to create private causes of action under section 5 to respond to states' deprivations of equal protection and uphold the VAWA.

Note

Wiping the Slate Clean: Expunging Records of Disability-Caused Misconduct as a Reasonable Accommodation of the Alcoholic Employee Under the ADA

*Gloria Y. Lee**

William Singer was a dispatcher in the communications center of the United States Capital Police.[1] Although his supervisors commended him for excellent work, he experienced difficulties in his job.[2] He had attendance problems and frequently violated a "call-off" rule, which required officers who request unscheduled leave to do so at least one hour before their shifts are to begin.[3] The source of his misconduct was his alcoholism.[4]

As a result of numerous infractions of company policy, Singer's employer issued him notices of discipline.[5] Singer initially denied having a drinking problem, but eventually disclosed that he was an alcoholic and voluntarily entered a rehabilitation program.[6] After recommending his removal, his employer then offered him a last-chance agreement.[7] The employer, however, refused Singer's request for "a firm choice and a fresh start," which would have entitled him to a choice between treatment and discipline.[8] Under such an agreement, if

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1. Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1104 (Fed. Cir. 1996) [hereinafter *SSA*].
2. *Id.*
3. *Id.*
4. *See id.* (relating that Singer disclosed to his employer that he was an alcoholic and that his alcoholism caused him to violate the "call-off" rule).
5. *Id.*
6. *Id.*
7. *Id.* Singer's employer proposed the last-chance agreement as an alternative to his discharge. *Id.*
8. *See id.* (noting that the employer's version of the last-chance agree-