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Constitutional Law - The Commerce Clause in the New Millennium: Enumeration Still Presupposes Something not Enumerated. United States v. Morrison, 120 S. Ct. 1740

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CONSTITUTIONAL LAW—The Commerce Clause in the New Millennium: Enumeration Still Presupposes Something not Enumerated. *United States v. Morrison*, 120 S. Ct. 1740 (2000).

"We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves."[1]

INTRODUCTION

On August 16, 1787, the delegates at the Constitutional Convention in Philadelphia unanimously, and without discussion, approved the Commerce Clause.[2] Although the Commerce Clause is worded exactly the same now as it was in the first draft of the Constitution, the scope of the Commerce Clause has expanded over the years away from the Framers' original understanding.[3] In its first decision dealing with the Commerce Clause in this century, the Supreme Court reaffirmed that Congress' power under the Commerce Clause is subject to judicially enforceable outer limits.[4] In declaring section 13981 of the Violence

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1. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 825-26 (4th Cir. 1999) (en banc) [hereinafter *Brzonkala III*].

2. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 142-43, 167, 308 (Revised ed. 1966). *See generally* Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulation But Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999) (for an excellent discussion of the adoption and history of the Commerce Clause). The provision in the Commerce Clause "and with the Indian Tribes" was subsequently proposed and adopted on September 4, 1787. *Id.* at 35. The Commerce Clause provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

3. FREDERICK H. COOK, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 6 (1908). *See* Nelson, *supra* note 2, at 13-50. *See also* United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) ("[O]ur case law has drifted far from the original understanding of the Commerce Clause"); Richard A. Epstein, *The Proper Scope of the Commerce Clause*, 73 VA. L. REV. 1387 (1987) (arguing that the scope of the Commerce Clause has expanded, away from the Framers' original understanding).

4. United States v. Morrison, 120 S. Ct. 1740, 1748 (2000) ("[E]ven under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.").

Against Women Act[5] (VAWA) unconstitutional and holding that Congress cannot regulate non-economic activity based on that activity's aggregate effect on interstate commerce, the Court affirmed that "[t]he Constitution requires a distinction between what is truly national and what is truly local."[6]

Christy Brzonkala, a freshman at Virginia Polytechnic Institute (Virginia Tech), was raped on September 21, 1994.[7] The alleged rapists, Antonio Morrison and James Crawford, both members of Virginia Tech's varsity football team, had met Brzonkala and another female student, Hope Handley, just thirty minutes earlier in Brzonkala's dormitory.[8] After fifteen minutes of conversation, Handley and Crawford left the dormitory room.[9] Allegedly, Morrison immediately asked Brzonkala if she would have sexual intercourse with him.[10] Brzonkala audibly told Morrison "no" twice and got up to leave the room.[11] Morrison allegedly then grabbed Brzonkala, threw her face-up on the bed, pushed her down by the shoulders, put his hands on her elbows, and while Brzonkala was struggling to push him off, forcibly raped her.[12] During the rape, Crawford allegedly re-entered the room, exchanged places with Morrison and also raped Brzonkala.[13] After Crawford had finished raping Brzonkala, Morrison allegedly proceeded to rape her again.[14] Neither Morrison nor Crawford used a condom.[15]

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5. The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of Titles 8, 16, 18, 28, and 42 U.S.C. (1994)). Section 13981, commonly referred to as the civil rights provision, provides in part that "[a] person . . . who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes 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." 42 U.S.C. § 13981(c) (1994).

6. *Morrison*, 120 S. Ct. at 1754. The Court, however, did not adopt a categorical rule against aggregating the effects of any non-economic activity, although it insisted that thus far in the nation's history, Commerce Clause cases have upheld regulation only where that activity is economic in nature. *Id.* at 1751.

7. *Id.* at 1746.

8. Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 953 (4th Cir. 1997) [hereinafter *Brzonkala II*], *rev'd Brzonkala III*, 169 F.3d at 826.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Morrison demonstrated the requisite gender animus needed to state a claim under section 13981 by telling Brzonkala before he left the room "You better not have any fucking diseases." Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779, 782 (W.D. Va. 1996) [hereinafter *Brzonkala I*], *rev'd Brzonkala II*, 132 F.3d

Following the attacks, Brzonkala became emotionally depressed and sought treatment from Virginia Tech's psychiatrist who prescribed antidepressant medication.[16] Ultimately, Brzonkala stopped attending classes because of the trauma associated with the gang rape.[17] In early 1995, Brzonkala filed a complaint against Morrison and Crawford under Virginia Tech's Sexual Assault Policy.[18] After a school-conducted hearing in which Morrison admitted having sexual intercourse with Brzonkala after she had twice told him "no," Virginia Tech found Morrison guilty of violating the Sexual Assault Policy.[19] Virginia Tech subsequently sentenced Morrison to an immediate two-semester suspension; however, Virginia Tech's Senior Vice President and Provost ultimately overturned Morrison's punishment because it was "excessive."[20] Morrison was informed of the decision to set aside his conviction, but Brzonkala was not.[21] Brzonkala permanently withdrew from Virginia Tech after learning from a newspaper article that Morrison would return to Virginia Tech in 1995.[22]

In December 1995, Brzonkala filed suit against Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia.[23] In March 1996, Brzonkala filed an amended

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at 974. As further evidence of Morrison's gender animus, he announced publicly in the dormitory dining hall, and in the presence of at least one female student, that he "liked to get girls drunk and fuck the shit out of them." *Id.*

16. United States v. Morrison, 120 S. Ct. 1740, 1746 (2000).

17. *Id. See also Brzonkala II*, 132 F.3d at 953. Brzonkala also feared for her safety because she was informed that another male student-athlete was overheard advising Crawford that he should have "killed the bitch." *Id.* at 954.

18. *Morrison*, 120 S. Ct. at 1746. Brzonkala did not file criminal charges against Morrison or Crawford because she believed "criminal prosecution was impossible because she had not preserved any physical evidence of the rape." *Brzonkala II*, 132 F.3d at 954.

19. *Id.* Virginia Tech's judicial committee found insufficient evidence to punish Crawford after he denied having any sexual contact with Brzonkala. *Id.*

20. *Id.* Morrison went through two hearings, and one appeal, before his conviction was ultimately overturned. After the first hearing under the Sexual Assault Policy, in which Morrison was found guilty, the Dean of Students upheld the sanctions imposed by the judicial committee; however, after Morrison threatened to initiate a court challenge to his conviction, Virginia Tech decided to conduct a second hearing under its Abusive Conduct Policy. *Id.* At the second hearing, Morrison was found guilty again and sentenced to an identical two-semester suspension; however, the description of Morrison's offense was changed, without explanation, from "sexual assault" to "using abusive language." *Id.* The Senior Vice President and Provost set aside this conviction because she concluded that it was excessive when compared to other cases prosecuted under the Abusive Conduct Policy. *Id.*

21. *Morrison*, 120 S. Ct. at 1746.

22. *Brzonkala II*, 132 F.3d at 955.

23. *Id.* at 956.

complaint alleging, among other things, that Morrison and Crawford's attack was in violation of section 13981 of the VAWA, which provides that any person who commits a crime of violence motivated by gender animus shall be liable for damages in a federal tort action.[24] The district court found that Brzonkala had stated a claim against Morrison under section 13981 but found that the VAWA was "an unconstitutional exercise of Congress's power, unjustified under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment."[25] A divided Fourth Circuit panel reversed the district court and held that Brzonkala stated a claim under the VAWA, and that the Commerce Clause provided Congress with the authority to enact the VAWA.[26] The full Fourth Circuit vacated the panel's decision and reheard the case *en banc*.[27] The *en banc* Fourth Circuit, by a divided vote, affirmed the district court's finding that Congress lacked the constitutional authority to enact section 13981 under either the Commerce Clause or the Fourteenth Amendment.[28] The Supreme Court granted certiorari to "consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence."[29] In a five-to-four decision, the Supreme Court held that section 13981 was an unconstitutional exercise of Congress' power under both the Commerce Clause and section five of the Fourteenth Amendment.[30]

This case note examines the first part of the Court's holding: That section 13981 of the VAWA is an impermissible exercise of Congress' power under the Commerce Clause.[31] This note first surveys the

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24. *Brzonkala I*, 935 F. Supp. at 781.

25. *Id.* at 801.

26. *Brzonkala II*, 132 F.3d at 974.

27. *Brzonkala III*, 169 F.3d at 829.

28. *Id.* at 905.

29. *Morrison*, 120 S. Ct. at 1745.

30. *Id.* at 1759. The Court was split along the same ideological lines as it was in *United States v. Lopez*, 514 U.S. 549 (1995), with Chief Justice Rehnquist writing the majority opinion in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. As in *Lopez*, Justices Souter, Stevens, Ginsburg, and Breyer dissented.

31. The focus of this case note is narrowed down to the Commerce Clause issue for primarily two reasons: (1) the legislative history of the VAWA reveals that Congress relied primarily on the Commerce Clause when it enacted section 13981; and (2) after the Supreme Court's decision in City of Boerne v. Flores, 521 U.S. 507 (1997), the petitioners resorted to defending section 13981 primarily as a valid exercise of Congress' power under the Commerce Clause. *See* S. REP. NO. 103-138, at 54-55 (1993) (stating that "[t]here is no doubt that the Congress has the power to create the title III [section 13981] remedy under the Constitution's Commerce Clause."); Danielle M. Houck, Note, *VAWA After Lopez: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University*, 31 U.C. DAVIS L. REV. 625, 632 (1998) ("legislative history reveals that Congress relied

history of the Court's Commerce Clause jurisprudence and then evaluates the majority's opinion in *Morrison* in light of that history. Next, this note argues that the *Morrison* decision was needed to (1) reaffirm, clarify, and extend important limits on Congress' enumerated powers; (2) identify federalism-related consequences of extending Commerce Clause limits beyond "economic" or "commercial" activities; and (3) curb the federalization of laws in areas traditionally reserved to the states. Finally, this note concludes by suggesting that the *Morrison* Court reached a correct and overdue decision because absolute deference to Congress' enumerated powers is antithetical to the Framers' finely wrought design, which serves to foster and protect fundamental rights and liberties.

BACKGROUND

Before evaluating the Supreme Court's latest pronouncement concerning the Constitutional limits on Congress' power to regulate interstate commerce, this note will briefly summarize the ebb and flow of the Court's Commerce Clause jurisprudence.[32] This note also summarizes the enactment and design of the VAWA, the problem it attempted to remedy, and its legislative history. The background of Commerce Clause jurisprudence is divisible into five sub-parts: (1) the Early Commerce Clause Years: 1824-1887; (2) the Laissez-Faire Years: 1887-1937; (3) the New Deal Turn Around: 1937-1942; (4) the Expansive Years, with emphasis on the expansion of civil rights under the Commerce Clause: 1942-1995; and (5) *United States v. Lopez* and the Non-Commercial Years: 1995-2000. The overview of the VAWA focuses solely on section 13981 and summarizes the evidence relied upon by Congress to justify its finding that gender-motivated violence has substantial interstate commercial effects.

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primarily on the Commerce Clause when it enacted VAWA"); *Brzonkala III*, 169 F.3d at 830 ("appellants have resorted to defending the section primarily as a valid exercise of Congress' power under the Commerce Clause."). After holding the VAWA was an impermissible exercise of Congress' power under the Commerce Clause, the Court addressed the alternative issue: whether the Act was Constitutional under section 5 of the 14th Amendment. *Morrison*, 120 S. Ct. at 1755. The Court held the VAWA was an impermissible exercise of Congress' power under the 14th Amendment because it was a remedy against private individuals, rather than the State, which the 14th Amendment prohibits. *Id.* at 1758.

32. Felix Frankfurter noted, "[u]nless we know this history, we may unwittingly . . . be imprisoned by it. Law necessarily expresses the pressures of the past, and the basic inquiry of any self-conscious jurisprudence is the extent to which it should do so." FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 2 (1937). *See also*, New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Justice Holmes noted "a page of history is worth a volume of logic.").

An Overview of Commerce Clause Jurisprudence

1. The Early Commerce Clause Years: 1824-1887

The first challenge of a congressional statute under the Commerce Clause to reach the Supreme Court was in *Gibbons v. Ogden*.[33] In *Gibbons*, Chief Justice Marshall broadly defined commerce by declaring "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse."[34] Chief Justice Marshall construed the word "among" in the Commerce Clause to mean intermingled with; that is, "[a] thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."[35] Thus, Congress' commerce power was the "power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[36] Although Chief Justice Marshall defined Congress' commerce power broadly, a fair reading of his opinion indicates that "an act of Congress had to meet two criteria: first, the regulated activity had to be 'commercial;' and second, it had to affect commerce in more than one state."[37] According to Chief Justice Marshall, if the Framers' intended the commerce power to reach the completely interior traffic of a state, then "the enumeration presupposes something not enumerated, and that something . . . must be the exclusively internal commerce of a State."[38]

In the decades following *Gibbons*, Commerce Clause jurisprudence generally dealt with the Dormant Commerce Clause.[39] The first

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33. 22 U.S. (9 Wheat.) 1 (1824). Until *Gibbons*, Congress made little use of its commerce power because the citizens generally did not view governmental intrusion into their commercial affairs positively. *See* Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 645 (1946). For a comprehensive review of the facts, political implications, and Chief Justice Marshall's decision in *Gibbons* see MAURICE G. BAXTER, THE STEAMBOAT MONOPOLY: GIBBONS V. OGDEN, 1824 (1972).

34. *Gibbons*, 22 U.S. (9 Wheat.) at 189.

35. *Id.* at 194. In addition, Marshall noted that "[c]omprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." *Id.*

36. *Id.* at 196.

37. Nelson, *supra* note 2, at 61. It is important to note that "[n]ot even an ardent nationalist and dicta lover like John Marshall thought to suggest such congressional power over noncommercial matters . . .." *Id.* at 62.

38. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

39. The Dormant Commerce Clause is the "power that prohibits states from intruding on the federal authority over interstate commerce even absent any congressional

Commerce Clause case to strike down an act of Congress was *United States v. Dewitt*.[40] In that case, the Court invalidated an act criminalizing the possession of illuminating oils on the basis that it was a general "police regulation" relating exclusively to the internal trade of the States.[41]

2. The Laissez-Faire Years: 1887-1937[42]

It was not until the late 1800s, given the growth of industrialization and large corporations, that the need for national economic and social legislation became more prominent in American society.[43] Congress, responding to the changing economic times, passed the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890 under its Commerce Clause power in an attempt to curtail monopolies and provide for the safe and efficient transportation of articles moving in interstate commerce.[44] However, during this period, the conservative Supreme Court developed two lines of cases that at times seem irreconcilable,

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legislation on the subject of the state action . . .." Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1408 (1987). *See* Nathan v. Louisiana, 49 U.S. (8 How.) 73, 82-83 (1850) (upholding a State license tax on brokers engaged in selling foreign bills because the tax was on domestic operations rather than interstate commerce); Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299, 320 (1851) (upholding Philadelphia pilotage laws because they are local in nature); Vealize v. Moor, 55 U.S. (14 How.) 568, 574 (1852) (upholding State-created steamboat monopoly because it involved regulation of internal commerce); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183-184 (1868) (upholding a foreign corporation tax against an insurance company because insurance is only local commerce); Kidd v. Pearson, 128 U.S. 1, 20-23 (1888) (upholding a State prohibition against the manufacture of intoxicating liquor because it was not a regulation of interstate commerce).

40. 76 U.S. (9 Wall.) 41, 45 (1869). *See also* United States v. Lopez, 514 U.S. 549, 597 (1995) (Thomas, J., concurring) (*Dewitt* "marked the first time the Court struck down a law as exceeding the power conveyed by the Commerce Clause.").

41. *Id. See also* Trade-Mark Cases, 100 U.S. 82, 96-99 (1879) (invalidating a federal statute creating a system of national trademark registration because the act was not limited to interstate commerce). *But see* United States v. Coombs, 37 U.S. 72, 78 (1838) (upholding a federal statute making it a crime to steal property from a wrecked ship located on State land); The Daniel Ball, 77 U.S. (10 Wall.) 557, 565 (1870) (upholding the power of Congress to license a ship that operated wholly within a State because it was an "instrument of interstate commerce").

42. During this period laissez-faire economic theories influenced the Court. Frankfurter, *supra* note 32, at 75-76 ("We have the authority of Mr. Justice Holmes for believing that due process has often epitomized judicial preference for laissez faire."); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); United States v. E.C. Knight Co., 156 U.S. 1, 16-17 (1895) (discussing laissez-faire economic theories).

43. *See* Rebecca E. Hatch, Note, *The Violence Against Women Act: Surviving the Substantial Effects of United States v. Lopez*, 31 SUFFOLK U. L. REV. 423, 429 (1997) (noting the "development of large corporations as a beckoning call for increased legislation.").

44. Stern, *supra* note 33, at 646.

invalidating economic regulation on one hand while upholding the regulation of morals on the other.[45]

a. Restrictive Line of Cases

The Supreme Court attempted to define commerce using semantic categories of what "commerce" entails and, just as importantly, what it does not entail.[46] In *United States v. E.C. Knight Co.*, the Court held that manufacturing, which precedes commerce, was not interstate commerce.[47] Therefore, Congress could not regulate intrastate manufacturing monopolies because it would obliterate the distinction between the "commercial power" of Congress and the "police power" retained in the states.[48] The formalistic direct/indirect effects test, as espoused in *E.C. Knight*, curtailed the effectiveness of the Sherman Antitrust Act and paved the way for the invalidation of other economic regulations passed pursuant to the Commerce Clause. [49] Thus, the Court used the direct/indirect effects test, and the distinction between Congress' commercial powers and the States' police powers, to invalidate Congressional statutes regulating the right to union membership,[50] general tort law,[51]

45. *Compare* Caminetti v. United States, 242 U.S. 470, 494-95 (1917) (upholding the Mann Act to protect the channels of interstate commerce against men who carried women across State lines for immoral purposes), *with* Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (holding Congress could not protect the channels of interstate commerce by regulating the immoral shipment of goods produced by child labor).

46. Susan M. Bauerle, Comment, *Congress' Commerce Clause Authority: Is the Pendulum Finally Swinging Back?*, 1997 DET. C. L. REV. 49, 57-63 (1997) ("In the earlier cases, the focus of the Court seemed to be defining what is *not* commerce more than what is commerce.") (emphasis in original). *See also* United States v. Lopez, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring).

47. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not part of it."). The Court also held that the regulation of agriculture, mining, and production in "all its forms" indirectly affect interstate commerce and are beyond the reach of Congress. *Id.* at 16. *See also* Kidd v. Pearson, 128 U.S. 1, 20 (1888) ("No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures [sic] and commerce.").

48. *See E.C. Knight Co.*, 156 U.S. at 13.

49. *Id.* at 12. The Court in *E.C. Knight Co.* "insisted that the nexus between the local and interstate was a formal qualitative one of logical relationships, rather than an empiric, practical one of economic impacts." GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 165 (13th ed. 1997). *See also*, Jennifer Lynn Crawford, Note, *America's Dark Little Secret: Challenging the Constitutionality of the Civil Rights Provision of the 1994 Violence Against Women Act*, 47 CATH. U. L. REV. 189, 202 (1997).

50. Adair v. United States, 208 U.S. 161, 179 (1907) (holding "that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part.").

51. The Employers' Liability Cases, 207 U.S. 463, 502-03 (1908) (invalidating a

the interstate shipment of materials manufactured by child labor,[52] pension and retirement plans for railroad workers,[53] and wage and hour laws under the National Industrial Recovery Act.[54] Finally, in *Carter v. Carter Coal Co.*, the Court summarized this line of cases by noting that commerce is intercourse for the purpose of trade, which includes transportation, purchase, sale and exchange of commodities between citizens of different states, and the regulation of the instrumentalities of interstate commerce.[55] Conversely, according to the Court, the production and manufacture of commodities, even with the intent to sell or transport in interstate commerce, is not commerce.[56]

b. Expansive Line of Cases

While commercial activity such as mining, production, and manufacturing proved to be problematic for the Court, it had little difficulty finding that Congress had the power to prohibit the interstate shipment of "harmful" products, even if the law was motivated by moral considerations.[57] In *Reid v. Colorado*, an early precedent, the Court held that Congress could, under its commerce power, prohibit illicit or noxious articles in the channels of interstate commerce.[58] In the *Lottery Case*, the Court held that Congress had the power under the Commerce Clause to prohibit immoral activity in interstate commerce.[59] The *Lottery Case* "quickly came to stand for the proposition that Congress had ple-

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statute creating negligence actions against common carriers because such matters have traditionally been under the control and authority of the States).

52. Hammer v. Dagenhart, 247 U.S. 251, 273-74 ("The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.").

53. R.R. Retirement Board v. Alton, 295 U.S. 330, 368 (1935) (matters dealing with "the social welfare of the worker . . . obviously lie outside the orbit of Congressional power" to regulate interstate commerce).

54. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (The wage and hour provisions over the petitioner's employees "have no direct relation to interstate commerce.").

55. Carter v. Carter Coal Co., 298 U.S. 238, 298, 303 (1936) (invalidating wage and hour regulations imposed on the coal industry by holding mining and production have an indirect effect on commerce and therefore cannot be regulated by Congress).

56. *Id.* at 301.

57. This is largely because the Court believed such activity had a direct effect on interstate commerce. *See A.L.A. Schecter Poultry Corp.*, 295 U.S. at 545-48.

58. Reid v. Colorado, 187 U.S. 137, 151 (1902) (upholding a section of the Animal Industry Act which prohibited the shipment of diseased cattle in interstate commerce).

59. Champion v. Ames, 188 U.S. 321, 363-64 (1903) (upholding the prohibition of lottery tickets in interstate commerce under the Federal Lottery Act of 1901). The Court also noted that Congress' commerce power is "plenary" and the power to regulate is the power to prohibit. *Id.* at 363.

nary commerce power over all interstate transportation—whether of property or people, and whether for commercial purposes or not."[60] Thus, Congress exerted a general police power over the channels of interstate commerce.[61] In this line of cases, the Court also held that Congress could prohibit the entrance of adulterated foods, stolen vehicles, and kidnapped persons into the channels of interstate commerce. [62]

Congress also successfully regulated the instrumentalities of interstate commerce.[63] For example, in *Northern Securities Co. v. United States*, the Court, in concluding that the Sherman Antitrust Act embraced railroad carriers, paved the way for the Court to apply the affecting commerce rationale to other cases involving the instrumentalities of interstate commerce.[64] The next logical extension of the "affects doctrine"

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60. Nelson, *supra* note 2, at 76. *See also* Hoke v. United States, 227 U.S. 308, 323 (1913) (upholding a section of the Mann Act which made it a crime to transport women across State lines for prostitution); Caminetti v. United States, 242 U.S. 470, 494-95 (1917) (upholding section of Mann Act which made it a crime to transport women across State lines for immoral purposes); Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311, 323 (1917) (upholding Webb-Kenyon Act which prohibited the transportation of intoxicating liquors in violation of any state law into which the liquor was transported).

61. Stern, *supra* note 33, at 650 (noting that the laws passed under this line of cases "were in substance police measures enacted in the interests of the public health and morality.").

62. Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911) (upholding a section of the Pure Food and Drug Act of 1906 which prohibited the shipment of adulterated foods in interstate commerce); Brooks v. United States, 267 U.S. 432, 438-39 (1925) (upholding a section of the National Motor Vehicle Theft Act which prohibited the knowing transportation of a stolen vehicle across state lines); Gooch v. United States, 297 U.S. 124, 128-29 (1936) (upholding conviction under the Federal Kidnapping Act which prohibited the transportation of kidnapped persons in interstate commerce).

63. United States v. Lopez, 514 U.S. 549, 572 (1995) (Kennedy, J., concurring) (Congress had the power to regulate the instrumentalities of interstate commerce because "even the most confined interpretation of 'commerce' would embrace transportation between the States."). *See generally* BERNARD C. GAVIT, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION §§ 96-103 (1932) (cataloging different instrumentalities of interstate commerce and cases).

64. Northern Securities Co. v. United States, 193 U.S. 197, 360 (1904) (the Court upheld the application of the Sherman Antitrust Act to a merger of competing railroads (which was essentially a securities transaction)). *See* The Pipe Line Cases, 234 U.S. 548, 561 (1914) (upholding Hepburn Act as applied to interstate oil carriers); Southern Ry. Co. v. United States, 222 U.S. 20, 26-27 (1911) (upholding the Safety Appliance Act, which required safety equipment on railroad cars, to intrastate railroad carriers because it affects interstate commerce and those who move in interstate commerce). *See also*, Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 727-34 (1996) (noting that Congress during this period could regulate instrumentalities which affected interstate commerce).

was in *Swift v. United States*.[65] In that case, Justice Holmes upheld an application of the Sherman Antitrust Act to intrastate stockyards because they were in the "current of commerce."[66] Nine years after *Swift*, the Court in *The Shreveport Rate Cases* permanently enshrined the affects doctrine in Commerce Clause jurisprudence by holding that Congress could regulate *intrastate* railroad rates to protect interstate commerce if the intrastate rate had "a close and substantial relation" to interstate traffic.[67] Armed with the "current of commerce" and "substantial economic effect on interstate commerce" doctrines, the Court became extremely deferential to Congress' ability to regulate intrastate activities that required the use of the instrumentalities of interstate commerce.[68] The New Deal era effectively put an end to the question of Congress' commerce power over intrastate economic activity, in favor of unbridled deference.

3. The New Deal Turn Around: 1937-1942

The New Deal turn around can be described succinctly in four words and an ampersand: *Jones & Laughlin, Darby, Wickard.*[69] Shortly after President Franklin Roosevelt's re-election in 1936, the Court de-

65. 196 U.S. 375 (1905).

66. *Id.* at 399. *Accord* Stafford v. Wallace, 258 U.S. 495, 514-516 (1922) (upholding the Packers and Stockyards Act of 1921 because stockyards are in the "current of commerce").

67. Houston, East & West Texas Ry. Co. v. United States, 234 U.S. 342, 351 (1914) (Congress is empowered to enact any appropriate legislation for the protection and advancement of interstate commerce and its "authority extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in matters having such a close and substantial relation that control is essential or appropriate to the security of that traffic . . .."). *Accord* R.R. Comm'n of Wis. v. Chicago, Burlington & Quincy R.R. Co., 257 U.S. 563, 589 (1922) (upholding Transportation Act of 1920 which gave the Interstate Commerce Commission the power to regulate intrastate rates in order to avoid discrimination against interstate commerce). In the interim period between *Swift* and the *Shreveport Rate Cases*, the Court was incrementally extending Congress' Commerce Clause power over the instrumentalities of interstate commerce. *See e.g.*, Baltimore and Ohio R.R. Co. v. Interstate Commerce Commission, 221 U.S. 612, 618 (1911) (Congress has the power to regulate the hours of employees who work as carriers in interstate commerce); Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 216 (1912) (upholding an Act requiring steamship companies to furnish reports to the interstate commerce commission although bookkeeping is not interstate commerce).

68. *See* Bd. of Trade of Chicago v. Olsen, 262 U.S. 1, 33, 40-41 (1923) (upholding the Grain Futures Act because it was in the "current of commerce"). *See also* United States v. Ferger, 250 U.S. 199, 205-06 (1919) (extending the affects doctrine to include documents (bills of lading) that facilitate trade).

69. These three cases expanded Congress' commerce power to unprecedented heights and in the process overruled or severely limited the restrictive line of cases which had placed outer limits on Congress' commerce power. *See infra* notes 72, 75, 78, and accompanying text.

cided *NLRB v. Jones & Laughlin Steel Co.*[70] The opinion by Chief Justice Hughes dramatically shifted Commerce Clause jurisprudence.[71] Hughes endorsed an empirical, rather than logical, "affecting commerce" rationale.[72] In upholding the National Labor Relations Act, and the Board's orders forcing employers to cease and desist their unfair labor practices, the Court did away with its formalistic distinction between manufacturing and commerce, holding that the determinative empirical question is the local activity's "effect upon interstate commerce."[73] Thus, the Court had no difficulty upholding two provisions of the Fair Labor Standards Act (FLSA) three years later in *United States v. Darby.*[74] The *Darby* Court, in sustaining the application of the FLSA to a lumber manufacturer, set forth three propositions that have greatly influenced Commerce Clause jurisprudence: (1) Congress can prohibit and regulate the manufacture and production of goods that are shipped in interstate commerce; (2) Congress' motive and purpose in regulation is

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70. 301 U.S. 1 (1937). President Roosevelt spoke often and openly about his dissatisfaction with the Supreme Court and in 1937 proposed to dramatically change the composition of the Supreme Court with his "court packing plan" by adding as many as six new justices to the Supreme Court. *See* Graglia, *supra* note 64, at 739. Roosevelt's court packing plan was ultimately rejected; however, most scholars believe that the court packing threat combined with the Depression played a role in changing the Court's doctrinal approach to the Commerce Clause. *Id.*

71. United States v. Lopez, 514 U.S. 549, 555 (1995) (describing *Jones & Laughlin* as a "watershed case"); Stephen M. Mcjohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 9 (1995) (noting "the New Deal greatly widened the scope of federal legislation."). *But see* Barry Cushman, *A Stream of Legal Consciousness: the Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105, 156 (1992) (arguing that *Jones & Laughlin* was not an aberration from previous Commerce Clause jurisprudence and that legal analysis under the Commerce Clause did not revolutionize until *United States v. Darby* and *Wickard v. Filburn*).

72. *Jones & Laughlin Steel Co.*, 301 U.S. at 37 (stating that Congress' commerce power extends to intrastate activities "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions.").

73. *Id.* at 40. However, it is important to note that *Jones & Laughlin* was not a wholesale repudiation of previous Commerce Clause jurisprudence; the Court still affirmed that Congress' power is subject to outer limits. *Id.* at 37 ("Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."). The Court also indicated its newly adopted deference to Congress by noting that it is "*primarily* for Congress to consider and decide" whether an activity obstructs or burdens interstate commerce. *Id.* (emphasis added).

74. 312 U.S. 100 (1940). The two provisions at issue prohibited the shipment of goods in interstate commerce by employers who did not comply with the wage and hour provisions set forth in the Act. *Id.* at 109.

irrelevant so long as the activity, even if it is wholly intrastate, has a substantial effect on interstate commerce; and (3) the Tenth Amendment is a "truism" rather than a substantive check limiting congressional power.[75]

The New Deal turnaround was completed in *Wickard v. Filburn*.[76] In its "most far reaching example of Commerce Clause authority over intrastate activity," the Court upheld the Agricultural Adjustment Act as applied to a farmer who grew wheat on his farm for home consumption.[77] In *Wickard,* the Court not only reaffirmed the substantial economic effects test, but also rendered it infinitely elastic by adopting the "aggregation" approach, also known as the cumulative effects doctrine.[78] Under the cumulative effects doctrine, Congress may regulate

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75. *Darby*, 312 U.S. at 115 ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."). Congress' commerce power extends to "activities intrastate which have a substantial effect on the commerce . . .." *Id.* at 119-20. "The [Tenth] [A]mendment states but a truism that all is retained which has not been surrendered." *Id.* at 124. The Tenth Amendment provides "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X. The Court also indicated that the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, augments the Commerce Clause powers of Congress. *Darby*, 312 U.S. at 118 ("The power of Congress . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."). *See also* United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) ("The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.").

76. 317 U.S. 111 (1942).

77. *Id.* at 114. *See* Lopez, 514 U.S. at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity . . ..").

78. *Wickard*, 317 U.S. at 125 ("[E]ven if appellee's [Farmer Filburn] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial *economic* effect on interstate commerce and this is irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'") (emphasis added). *See also id.* at 127-28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."). The Court also, as it did in *Darby*, noted that the Necessary and Proper Clause defines the scope and limits of Congress' power to regulate intrastate activity under the Commerce Clause. *Id.* at 124.

any activity, taken in the aggregate, which exerts a substantial economic effect on interstate commerce.[79] In short, *Jones & Laughlin, Darby,* and *Wickard* revolutionized Commerce Clause jurisprudence by giving Congress the discretion to regulate almost *any* class of activities under the guise of its commerce power for the next sixty years.

4. The Expansive Years, with Emphasis on Civil Rights Legislation: 1942-1995

Owing to the Court's inability to articulate any judicially enforceable limits on the reach of the commerce power, Congress began to regulate nearly every imaginable local activity, enacting civil rights, criminal, and environmental laws under the Commerce Clause.[80] The Supreme Court rubber-stamped each and every statute that came before it during this era.[81] For example, prior to the passage of the Civil Rights Act of 1964, Congress prohibited racial discrimination in the channels of interstate commerce.[82] Subsequent decisions upheld prohibitions of local activity that occurred before and after the channels of interstate commerce were utilized.

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79. *Id.* at 124.

80. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (upholding portion of Consumer Credit Protection Act prohibiting loan sharking); Scarborough v. United States, 431 U.S. 563 (1977) (upholding a statute making it a crime for convicted felons to possess firearms); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (upholding Surface Mining Control and Reclamation Act under the Commerce Clause). *But see, e.g.*, United States v. Bass, 404 U.S. 336, 347 (1971) (setting aside conviction under Omnibus Crime Control and Safe Streets Act because "the Government has failed to show the requisite nexus with interstate commerce."). Because of the scope and number of laws passed under the Commerce Clause in this era, this note will limit the discussion only to civil rights laws because the statute involved in *Morrison* was a civil rights statute.

81. Nelson, *supra* note 2, at 83-84 ("In the half-century following *Wickard*, every one of the vast number of statutes enacted under the Commerce Clause survived judicial review."). *But see, e.g.*, National League of Cities v. Usery, 426 U.S. 833, 854-55 (1976) (declaring a portion of FLSA, which applied the federal minimum wage requirements to the states as employers, unconstitutional under Congress' commerce power because it violated the 10th Amendment), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985); Gregory v. Ashcroft, 501 U.S. 452 (1991); United States v. New York, 505 U.S. 144 (1992).

82. *See* Mitchell v. United States, 313 U.S. 80, 97 (1941) (upholding a section of the Interstate Commerce Act prohibiting racial discrimination on railroad cars); Henderson v. United States, 339 U.S. 816, 824 (1950) (same); Morgan v. Virginia, 328 U.S. 373, 386 (1946) (holding Virginia statute requiring segregation on busses unconstitutional because "seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel."); Boynton v. Virginia, 364 U.S. 454, 463 (1960) (upholding section of Interstate Commerce Act prohibiting racial discrimination on railroad cars as applied to a bus terminal restaurant which was not owned, operated, or controlled by the bus company).

On December 14, 1964, the Supreme Court handed down two decisions upholding Title II of the Civil Rights Act of 1964 (the Act), which Congress passed pursuant to its Commerce Clause power.[83] In *Heart of Atlanta Motel v. United States*, the Court upheld the Act as applied to a local motel that served interstate travelers because of the "disruptive effect that racial discrimination has . . . on *commercial* intercourse."[84] In so holding, the Court ushered in a new Commerce Clause test—the "rational basis" test.[85] Thus, under *Heart of Atlanta Motel*, Congress could regulate local activity if it had a rational basis for concluding that the local activity had a substantial effect on interstate commerce.[86] Similarly, in *Katzenbach v. McClung*, the Court upheld the Act as applied to a local restaurant that served food that had moved in interstate commerce because Congress had a rational basis for concluding racial discrimination placed burdens on food purchased in interstate commerce.[87] In both decisions, the activity being regulated was commercial in nature and affected persons or goods moving in the channels of interstate commerce.[88] With the rational basis test added to Congress'

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83. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 397 U.S. 294 (1964). *See also*, Daniel v. Paul, 395 U.S. 298 (1969) (same). Title II of the Civil Rights Act prohibits discrimination in places of public accommodation. 42 U.S.C. § 2000a (1994).

84. *Heart of Atlanta Motel*, 379 U.S. at 257 (emphasis added).

85. *Id.* at 258-59 (noting that the only two questions needed to resolve the case are: "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a rational basis, whether the means selected to eliminate the evil are reasonable and appropriate."). The Court answered both questions affirmatively. *Id.* at 261. Under the rational basis test, Congress can regulate pursuant to its commerce power if: (1) it has a rational basis for concluding the local activity affects interstate commerce; and (2) the means chosen by Congress to give effect to the legislation are reasonable and appropriate.

86. *Id.* at 254-58. In effect, the Court merged its Substantive Due Process test with its Commerce Clause test. The Court also reaffirmed the proposition set out in *Darby*, *Wickard*, and *Wrightwood Dairy Co.*, that the Necessary and Proper Clause permits any Commerce Clause legislation that is appropriate to reach a Constitutional end. *Id.* at 258.

87. Katzenbach v. McClung, 397 U.S. 294, 296-303 (1964). In finding that the Act was part of a larger regulatory scheme for the protection of commerce, the Court noted that although Congress had a rational basis for passing the law, it did "not preclude further examination by [the] Court." *Id.* at 303. The Court rubber-stamped the Act even though there was no "direct evidence" proving that less food moving in interstate commerce was sold by restaurants that refused to serve African Americans. *Id.* at 304.

88. In *Heart of Atlanta Motel* the Court was concerned with a motel's refusal to engage in a business transaction with an African American patron, and in *Katzenbach* the Court was concerned with a restaurant's refusal to engage in a business transaction with a customer. Lisa A. Carroll, Comment, *Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803, 828 (1997). In addition, Title II of the Civil Rights Act has a jurisdictional element requiring that either "interstate travelers" or

arsenal of power under the Commerce Clause, the Court upheld various other civil rights legislation until the Court's landmark decision in *United States v. Lopez.*[89]

5. *United States v. Lopez* and the Non-Commercial Years: 1995-2000

In *Lopez,* the Court, for the first time in nearly six decades, held that Congress had exceeded its power under the Commerce Clause by declaring the Gun Free School Zone Act unconstitutional.[90] Writing for the majority, Chief Justice Rehnquist noted that under the Court's Commerce Clause precedents there are three categories of activities that Congress may regulate and protect under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those activities that substantially affect interstate commerce.[91] If the regulated activity falls under the third category, the substantial effects test, the Court will consider four factors: (1) whether the activity is economic or commercial in nature; (2) whether the activity contains a jurisdictional element connecting the activity to interstate commerce; (3) congressional findings to the extent that they may aid the Court in its independent evaluation of an act's constitutionality; and (4) the actual relationship between the activity being regulated and interstate commerce.[92] The Court categorically rejected the government's "cost of crime" and "national productivity" arguments noting that if the Court accepted the government's arguments it would "be hard pressed to posit any activity by an individual that Congress is without power to regulate."[93] If the "but-for" reasoning of the government's brief

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products have "moved in commerce." 42 U.S.C. § 2000a (c) (1994).

89. *See, e.g.*, Fitzpatrick v. Blitzer, 427 U.S. 445, 448 (1976) (upholding amendments to Title VII of the Civil Rights Act); EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (upholding Age Discrimination Act of 1967).

90. United States v. Lopez, 514 U.S. 549, 551 (1995). Because the dissenting opinions in *Lopez* have been analyzed extensively elsewhere, this note only addresses the majority's opinion. *See infra* note 96. The Gun Free School Zone Act was amended shortly after *Lopez. See* 18 U.S.C. § 922(q) (1990) (codified as amended at Pub. L. No., 104-208, § 657, 110 Stat. 3009 (1996) (amending 18 U.S.C. § 922(q) to read "[I]t shall be unlawful for any individual to knowingly possess a firearm that has moved in or otherwise affects interstate or foreign commerce at a place the that the individual knows . . . is a school zone.")). For a discussion of the Constitutionality of this amendment see Harry Litman and Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921 (1997).

91. *Lopez*, 514 U.S. at 559.

92. *Id.* at 559-64.

93. *Id.* at 564. The "cost of crime" argument was essentially that costs of violent crime are substantial, which raises the cost of insurance, which in turn is spread

were adopted, the Court wrote, judges could "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[94] In an opinion that expressed the Rehnquist Court's federalism-related concerns, the Court articulated a judicially manageable limit on Congress' commerce power.[95]

Lopez spawned an explosion of scholarly work, with some commentators criticizing the decision, others praising it, and some noting that it was simply a warning to Congress to provide congressional findings identifying facts disclosing that the regulated local activity substantially affects interstate commerce.[96] Generally, most scholars agreed that

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throughout the population, which in turn, in the aggregate, affects interstate commerce. *Id.* at 563-64. The "national productivity" argument was essentially that the presence of guns in schools threatens the learning environment, which adversely affects education, which in turn leads to a less productive citizenry, which in turn would affect the national economy and have an adverse affect on interstate commerce. *Id.* at 564.

94. *Id.* at 567.

95. *See id.* at 564, 567 (to uphold the Act would require the Court to "conclude that the Constitution's enumeration of powers does not presuppose something not enumerated.").

96. *See, e.g.*, Deborah Jones Merritt, *COMMERCE!*, 94 MICH. L REV. 674 (1995); Judge Louis H. Pollak, *Forward*, *id.* at 533; Donald H. Regan, *Reflections on* United States v. Lopez*: How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, *id.* at 554; Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, *id.* at 752; Deborah Jones Merritt, *The Fuzzy Logic of Federalism*, 46 CASE W. RES. L. REV. 685 (1996); Barry Friedman, *The New Federalism after* United States v. Lopez*: Panel II: Legislative Findings and Judicial Signals: A Positive Reading of* United States v. Lopez, *Id.* at 757; Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, *id.* at 801; Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, *id.* at 695; Suzanna Sherry, *The Barking Dog*, *id.* at 877; Mark Tushnet, *Living in a Constitutional Moment?:* Lopez *and Constitutional Theory*, *id.* at 845; Graglia, *supra* note 64; Andrew St. Laurent, *Reconstituting* United States v. Lopez*: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61 (1997); Stephen R. McAllister, Lopez *Has Some Merit*, 5 KAN. J.L. & PUB. POL'Y 9 (1996); John P. Frantz, *The Reemergence of the Commerce Clause as a Limit on Federal Power:* United States v. Lopez, 115 S. Ct. 1624 (1995), 19 HARV. J.L. & PUB. POL'Y 161 (1995); Stephen M. Mcjohn, *The Impact of* United States v. Lopez*: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1 (1995); Russel F. Pannier, Lopez *and Federalism*, 22 WM. MITCHELL L. REV. 71 (1995); Julian Epstein, *Noncomputer Legislation: Policy Essay: Evolving Spheres of Federalism after* U.S. v. Lopez *and Other Cases*, 34 HARV. J. ON LEGIS. 525 (1997); Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997). For student work *see, e.g.*, Nicole Huberfeld, Note, *The Commerce Clause Post-*Lopez*: It's Not Dead Yet*, 28 SETON HALL L. REV. 182 (1997); Eric Andrew Pullen, Comment, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment: "Simply Because Congress May Conclude That a Particular Activity Substantially Affects Interstate Commerce Does Not*

Lopez would be limited to its specific facts and that the "Supreme Court is unlikely to expand the opinion's scope."[97] Federal courts took essentially the same limited approach, upholding the vast majority of statutes challenged under the Commerce Clause after *Lopez*.[98]

Section 13981 of the Violence Against Women Act of 1994

The VAWA, first introduced in 1991 by Senator Joseph Biden, was passed in 1994 after a four-year struggle in both houses of Congress.[99] The VAWA was passed as Title IV of the Violent Crime Control and Law Enforcement Act.[100] By far the most controversial of the

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Necessarily Make it So.", 39 S. TEX. L. REV. 1029 (1998); Larry E. Gee, Comment, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers By Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151 (1995); Barry C. Toone and Bradley J. Wiskirchen, Note, *Great Expectations: The Illusion of Federalism After* United States v. Lopez, 22 J. LEGIS. 241 (1996); Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of* United States v. Lopez, 34 DUQ. L. REV. 71 (1995); Robert Wax, Comment, *United States v. Lopez: The Continued Ambiguity of Commerce Clause Jurisprudence*, 69 TEMP. L. REV. 275 (1996). This does not purport to be a comprehensive list.

97. Deborah Jones Merrit, *COMMERCE!*, 94 MICH. L. REV. 674, 750 (1995).

98. *See generally* David M. Fine, Note, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252 (1998) (listing cases). *See also* United States v. Wall, 92 F.3d 1444, 1448-49 (6th Cir. 1996), *cert. denied* 117 S. Ct. 690 (1997) (listing statutes and cases which have been upheld under *Lopez* analysis). In *Morrison*, however, the Court did not limit *Lopez* to its specific facts. Indeed, the Court demonstrated it has finally abandoned its "hands-off" approach, which had given Congress the leeway to destroy the "healthy balance of power between the States and the Federal Government . . . ." United States v. Lopez, 514 U.S. 549, 552 (1995).

99. *See* Victoria F. Nourse, *Fifteenth Anniversary Celebration: Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 15 WIS. WOMEN'S L.J. 257 (2000) (giving a comprehensive account of VAWA's legislative history since it was first introduced in 1991).

100. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of Titles 8, 16, 18, 28, and 42 U.S.C.). Title IV contains seven subtitles: (1) Subtitle A: "Safe Streets for Women;" (2) Subtitle B: "Safe Homes for Women;" (3) Subtitle C: "Civil Rights for Women;" (4) Subtitle D: "Equal Justice for Women in the Courts;" (5) Subtitle E: "Violence Against Women Act Improvements;" (6) Subtitle F: "National Stalker and Domestic Violence Reduction;" and (7) Subtitle G: "Protections for Battered Immigrant Women and Children." *Id.* at 108 Stat. 1902-1955, *reprinted* at 1994 U.S.C.C.A.N. (108 Stat.) 1902. The VAWA provides, among other things, for: increased federal penalties for sexual offenders, 42 U.S.C. § 13701 (1994); grants for increased safety for women in public transit and parks, 42 U.S.C. § 13931 (1994); amendments to the Federal Rules of Evidence, 28 U.S.C. § 2074 (1994), Fed. R. Evid. 412; a national domestic violence hotline, 42 U.S.C. § 10416 (1994); grants to encourage mandatory arrest policies, 42 U.S.C. § 3796hh (1994); training and education for judges and court personnel in state courts, 42 U.S.C. § 13991 (1994); and criminalizes the crossing of state lines to harm, or with the intent to harm, a spouse in violation of a

VAWA provisions is section 13981—the civil rights remedy, which Congress passed under the Commerce Clause.[101]

Section 13981 creates a statutory right for "All persons within the United States . . . to be free from crimes of violence motivated by gender."[102] A crime motivated by gender is defined as a crime of violence "committed because of gender or on the basis of gender, and due, at least in part, to animus based on the victim's gender."[103] To state a cause of action under section 13981 the plaintiff must prove by a preponderance of the evidence that: (1) the act was not a random act of violence unrelated to gender; and (2) the act was due at least in part to an animus based on the victim's gender.[104] Proof of "gender-motivation" is determined using a totality of the circumstances test similar to that used in race or sex discrimination cases.[105] If the plaintiff proves the *prima facie* case, she is entitled to compensatory and punitive damages, injunctive or declaratory relief, and attorney's fees for prevailing in a private civil action against the perpetrator.[106] There is no jurisdictional element establishing that section 13981 is sufficiently tied to the use of the channels or instrumentalities of interstate commerce.[107] The Act gives state

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state protection order, 18 U.S.C. § 2261 (1994).

101. 42 U.S.C. § 13981(a). Congress also relied on section 5 of the 14th Amendment to enact section 13981, however, this note only focuses on the Commerce Clause because Congress relied primarily on that clause, as evidenced by the legislative history, in enacting section 13981. *See supra* note 31.

102. *Id.* at § 13981(b).

103. *Id.* at § 13981(d)(1). A "crime of violence" is defined as "(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come with the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction . . . and (B) includes an act or series of acts that would constitute a felony . . . but for the relationship between the person who takes such action and the individual against whom such action is taken." *Id.* at § 13981(d)(2)(A)-(B). Section 16 of Title 18 defines a crime of violence as "an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16 (1994).

104. *Id.* at § 13981(e)(1).

105. S. REP. NO. 102-97, at 50 (1991). The totality of circumstances test includes such factors as: language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any apparent motive (battery without robbery for example); and common sense. *Id.* at n.72.

106. 42 U.S.C. § 13981(c).

107. United States v. Morrison, 120 S. Ct. 1740, 1751 (2000) (noting that section 13981 "contains no jurisdictional element establishing that the federal cause of action is

and federal courts concurrent jurisdiction over a section 13981 claim but prohibits the exercise of supplemental jurisdiction over any state law claim "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."[108] In effect, Congress created a private cause of action for victims of gender-motivated violence against their perpetrators to fill the "gender gap" left by traditional anti-bias crime laws.[109]

A voluminous congressional record accompanied the passage of the VAWA.[110] The majority of Congress' findings dealt with the problems of domestic violence and rape.[111] Congress found, among other things, that: (1) violent attacks by men now tops the list of dangers to an American woman's health; (2) every fifteen seconds, a woman is battered and, every six minutes, a woman is raped in the United States; (3) every week during 1991 more than 2000 women were raped and more than ninety women were murdered—nine out of ten by men; (4) an estimated four million American women are battered each year by their husbands or partners; (5) approximately ninety-five percent of all domestic abuse victims are women; (6) three out of four American women will be victims of violent crimes during their life; and (7) even the fear of gender-based violence affects the national economy.[112] Congress concluded

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in pursuance of Congress' power to regulate interstate commerce.").

108. 42 U.S.C. § 13981(e)(3)-(4).

109. S. REP. NO. 103-138, at 48 (1993).

110. *See generally* S. REP. NO. 103-138 (1993); S. REP. NO. 102-197 (1991); S. REP. NO. 101-545 (1990); H.R. REP. NO. 103-711 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839; H.R. REP. NO. 103-395 (1993); Hearing on Domestic Violence, 1993: Hearing Before Senate Judiciary Comm. on the Need to Concentrate the Fight Against an Escalating Blight of Violence Against Women, 103rd Cong. (1993); Violence Against Women: Fighting the Fear, 1993: Hearing Before the Senate Judiciary Comm. on Examining the Rise of Violence Against Women in the State of Maine and Other Rural Areas, 103rd Cong. (1993); Violent Crimes Against Women, 1993: Hearing on P.L. 103-322 Before the Senate Judiciary Comm. on the Problems of Violence Against Women in Utah and Current Remedies, 103rd Cong. (1993); Implementation of the Violence Against Women Act, 1994: Hearing Before the Senate Judiciary Comm. on the Implementation of the Violence Against Women Act Provision of the Violent Crime Control and Law Enforcement Act, 103rd Cong. (1994); Violence Against Women: Victims of the System, 1991: Hearings on S. 15 Before the Senate Judiciary Comm. on a Bill to Combat Violence and Crimes Against Women on the Streets and in Homes, 102d Cong., (1991); Domestic Violence: Not Just a Family Matter, 1994: Hearing before the Subcomm. on Crime and Criminal Justice of the House Judiciary Comm., 103rd Cong., (1994). See also Joseph R. Biden, Jr., The Civil Rights Remedy of the Violence Against Women Act: A Defense, 37 HARV. J. ON LEGIS. 1, 20-24 (2000) (outlining legislative history of section 13981).

111. *See* S. REP. NO. 103-138, at 37 (1993); S. REP. NO. 102-197, at 33 (1991); S. REP. NO. 101-545, at 28 (1990); H.R. REP. NO. 103-395, at 25 (1993).

112. S. REP. NO. 102-197, at 36 (1991); S. REP. NO. 103-138, at 38, 54 (1993); H.R.

that, "estimates suggest we spend $5 to $10 billion a year on health care, criminal justice, and other societal costs of domestic violence."[113] After four years of hearings and re-drafts, and after compiling a voluminous congressional record, Congress passed the VAWA on August 25, 1994, and President Clinton signed it into law on September 13, 1994.[114]

PRINCIPAL CASE

In Morrison, the Supreme Court affirmed the Fourth Circuit's en banc decision holding that Congress lacked the constitutional authority to enact section 13981 under the Commerce Clause.[115] The majority opinion, written by Chief Justice Rehnquist, dealt succinctly with one issue: The "constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence."[116] After brushing over the facts and legislative history of the Act in a little over a page, the Court first noted that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.'"[117]

The Court stated that *Lopez* "provides the proper framework for conducting the required analysis under § 13981."[118] The Court, as it did in *Lopez*, identified the three broad categories of activities that Congress can regulate and protect under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate

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REP. 103-395, at 26 (1993). This short list is only for illustrative purposes; Congress found many more statistics on domestic violence. *See also* Lisanne Newell Leasure, *Commerce Clause Challenges Spawned by United States v. Lopez are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate Over how the VAWA will Fare in the Wake of Lopez*, 50 ME. L. REV. 409, 416 (1998).

113. H.R. REP. 103-395, at 41 (1993). Somewhat ironically, Senator Biden, the VAWA's sponsor, often quotes these statistics as evidence of the effect domestic violence has on the economy; however, when defending the VAWA against being overinclusive he is quick to point out section 13981 "does not cover everyday domestic violence cases." S. REP. NO. 102-197, at 69 (1991).

114. On August 21, the House passed the conference report by a vote of 235-195; the Senate agreed to it on August 25 by a vote 61-38. Nourse, *supra* note 99, at 292.

115. United States v. Morrison, 120 S. Ct. 1740, 1745 (2000). The Court also held that Congress lacked the power under section 5 of the Fourteenth Amendment to enact section 13981. *Id.* at 1758.

116. *Id.* at 1745.

117. *Id.* at 1748 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)). *See also* United States v. Lopez, 514 U.S. 549, 552 (1992) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

118. *Morrison*, 120 S. Ct. at 1749.

commerce; and (3) activities that substantially affect interstate commerce.[119] The Court reasoned that because gender-motivated violence is being regulated *wherever* it occurs, the proper analysis is under the third category—activities that substantially affect interstate commerce.[120] Noting that *Lopez* "clarified" the case law under the substantial effects test, the Court used the four factors previously identified in *Lopez* to evaluate section 13981's constitutionality: (1) the nature of the activity being regulated, namely, whether the activity is economic or commercial in nature; (2) the presence, or lack thereof, of a jurisdictional element connecting the activity to interstate commerce; (3) the Act's legislative history; and (4) the link between the local activity being regulated and its substantial effect on interstate commerce.[121] The Court held that Congress cannot, under its commerce power, regulate a non-economic intrastate activity, and "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[122]

In contrast to the criminal statute in *Lopez*, section 13981 was a civil rights statute that gave victims of gender-motivated violence recourse in the federal courts.[123] The government thus proposed two arguments that it believed distinguished section 13981 from the criminal statute at issue in *Lopez*.[124] First, the government argued that section 13981 is not a criminal statute; rather, it is a civil rights remedy that protects the national economy from the cumulative effect of discrimination, much like the Civil Rights Act of 1964.[125] Second the government argued that because section 13981 is a civil rights statute, it does not raise federalism concerns.[126] Under this reasoning the government postulated that, unlike criminal law that is traditionally regulated by the states, civil rights laws are within the sphere of the federal government's powers.[127]

The Court was not persuaded by the government's arguments. It observed that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."[128] The Court stressed that "*Lopez's* review of Commerce Clause

119. *Id.*
120. *Id.*
121. *Id.* at 1749-51.
122. *Id.* at 1751, 1754.
123. *See* 42 U.S.C. § 13981(c) (1994).
124. *See* Brief for Petitioner at 33-37, United States v. Morrison, 120 S. Ct. 1740 (2000).
125. *Id.* at 33.
126. *Id.* at 34-35.
127. *Id.* at 35 ("The vindication of civil rights has long been a paradigmatic federal responsibility.").
128. United States v. Morrison, 120 S. Ct. 1740, 1750 (2000).

case law demonstrates that in those cases where [the Court has] sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."[129] After the Court made this subtle clarification of *Lopez*, it was relatively easy for it to conclude that gender-motivated violence, like possession of a gun in school, is not economic activity in any sense of the phrase.[130] The Court did not explicitly create a categorical rule applicable across the board in every conceivable case. It did hold, however, that the *Wickard* cumulative effects doctrine does not apply to non-economic gender-motivated violence.[131]

The Court pointed out that section 13981 did not contain a "jurisdictional element establishing that the federal cause of action [was] in pursuance of Congress' power to regulate interstate commerce."[132] Therefore, the Court reasoned that section 13981 could not be sustained under the jurisdictional element requirement because "Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime."[133]

In a departure from past precedent, the Court did not apply a purely empirical "rational basis" test for reviewing congressional findings. The Court concluded that "[i]n contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."[134] Nevertheless, the Court rejected the notion that gender-motivated violence has a substantial effect on interstate commerce by stating that Congress found only that gender-motivated violence has a serious impact on victims and their families, despite congressional findings showing the quantitative costs of domes-

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129. *Id.* (citing United States v. Lopez, 514 U.S. 549, 559-60 (1995)).

130. *Id.* at 1751. In the peroration of his opinion, the Chief Justice wrote, "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 1754.

131. Arguably, this is not an extension of *Lopez* because according to the Court, *Lopez* and *Morrison* are the only two cases in Commerce Clause history that have attempted regulate non-economic activity. *Id.* at 1751. However, the cumulative effect of gender motivated violence on the economy, along with the "rational basis" test, is exactly what many federal courts relied upon in upholding section 13981 after *Lopez* and before *Morrison*. *See infra* note 161.

132. *Morrison*, 120 S. Ct. at 1751.

133. *Id.* at 1752.

134. *Id.*

tic violence and rape.[135] The Court concluded that the mere existence of congressional findings, by itself, was insufficient to sustain section 13981 because the constitutionality of an act of Congress passed pursuant to its commerce power is "ultimately a judicial rather than a legislative question, and can be settled finally only by [the] Court."[136] Moreover, the Court reasoned that the VAWA's congressional findings were substantially weakened because they relied on the "cost of crime" and "national productivity" arguments previously rejected by the Court in *Lopez*.[137] This "but-for causal chain" of reasoning was rejected as a slippery slope; in the Court's words, "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a sub-set of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part."[138]

According to the Court, the link between gender-motivated violence and its effect on interstate commerce was too attenuated to fall under Congress' commerce power.[139] The Court noted that the states, under their general police powers, have always regulated intrastate violent crime.[140] In addition, if the Court upheld section 13981, Congress could not only regulate violent crime, but also other areas of traditional state regulation such as marriage, divorce, and childrearing.[141] Thus, because Congress cannot aggregate the effects of any non-economic activity, particularly in areas of traditional state sovereignty, it lacked the authority under its commerce power to enact section 13981 of the VAWA.[142]

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135. *Id. See supra* notes 112 and 113.

136. *Morrison*, 120 S. Ct. at 1752 (citing United States v. Lopez, 514 U.S. 549, 557 (1995), quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

137. *Id.*

138. *Id.* at 1752-53.

139. *Id.* at 1752.

140. *Id.* at 1754 ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

141. *Id.* at 1753.

142. Justice Thomas filed a short concurring opinion in the case to reiterate his view "that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with [the] Court's early Commerce Clause cases." United States v. Morrison, 120 S. Ct. 1740, 1759 (2000) (Thomas, J., concurring). Justice Thomas also noted that "until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce." *Id.*

Morrison also included two dissenting opinions. In a spirited and lengthy dissent, Justice Souter took exception to three aspects of the majority's opinion: (1) the majority's disregard for congressional findings by supplanting the rational basis test with a "uniquely judicial competence"; (2) the majority's revival of a formalistic, categorical approach to Commerce Clause jurisprudence; and (3) the majority's anachronistic federalism ideals.[143]

After an extensive review of the VAWA's legislative history and the "mountain of data" compiled by Congress, Justice Souter noted, "the sufficiency of the evidence before Congress to provide a rational basis for the finding [that gender-motivated violence substantially affects interstate commerce] cannot seriously be questioned."[144] Justice Souter's primary difficulty with the majority's opinion was its abolition of the rational basis test:

> Thus, the elusive heart of the majority's analysis is . . . its statement that Congress' findings of fact are "weakened" by the presence of a disfavored "method of reasoning." This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.[145]

Justice Souter characterized the majority's "enquiry into commercial purposes" as a return to the pre-New Deal formalism in which the economic/non-economic distinction is essentially "a cousin to the intent-based analysis employed in *Hammer*."[146] Last, Justice Souter asked why the majority relied on the economic/non-economic distinction. His "answer is that in the minds of the majority" this "categorical formalism" is useful in "serving a conception of federalism."[147] Justice Souter, however, concluded that this impractical conception of federalism is misplaced because the national economy is integrated and the adoption of the Seventeenth Amendment has restricted state power.[148]

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143. *Id.* at 1764 (Souter, J., dissenting). Justices Stevens, Ginsburg, and Breyer joined in the principal dissent penned by Justice Souter.

144. *Id.* at 1760, 1763.

145. *Id.* at 1764.

146. *Id.* at 1767.

147. *Id.* at 1768.

148. *Morrison*, 120 S. Ct. at 1768-75. The Seventeenth Amendment eliminated the selection of senators by state legislatures, providing instead for their direct election. U.S. CONST. amend. XVII.

Justice Breyer also authored a dissent, which Justices Stevens, Souter, and Ginsburg joined. Justice Breyer argued that the majority's economic/non-economic distinction is unworkable and may ultimately hinder, rather than protect, the states.[149] According to Breyer, the "Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant."[150] Moreover, Justice Breyer contended that Congress as an institution can better reflect state concerns for autonomy, often evident in the details of sophisticated statutory schemes, than the judiciary, which often applies general rules that nullify particularized findings of fact.[151] Thus, Justice Breyer concluded that the Court's "traditional 'rational basis' approach is sufficient" when the Court is reviewing an Act passed under Congress' commerce power.[152]

ANALYSIS

The majority in *Morrison* correctly held that section 13981 is unconstitutional, because the Court has a duty to impose "meaningful limits" on Congress' commerce power.[153] Absent a meaningful limitation such as the commercial/non-commercial distinction, Congress can regulate nearly any local activity under the Commerce Clause.[154] The Commerce Clause, prior to *Morrison*, was the one major exception to a basic tenet of constitutional law—the careful enumeration of powers was designed by the Framers to reduce the risk of abuse from either the states or the federal government and ensure protection of fundamental rights.[155]

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149. Justice Breyer gave several examples of the problems associated with the majority's formalism: "Does the local street corner mugger engage in 'economic' activity or 'noneconomic' activity when he mugs for money?" *Morrison*, 120 S. Ct. at 1774. "The Court itself would permit Congress to aggregate, hence regulate, 'noneconomic' activity taking place at economic establishments . . .. How much would be gained, for example, were Congress to reenact the present statute in the form of 'An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in Interstate Commerce?'" *Id.* at 1774, 1776. "If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them?" *Id.* at 1775.

150. *Id.* at 1775. Interestingly, Justice Breyer himself acknowledged that the Court has only held that the *commercial* effects are relevant. The dispositive question then is whether the activity penalized by section 13981 had an economic effect that is too attenuated, which, as the Court held, is a judicial question that does not require deference to Congress.

151. *Id.* at 1777.

152. *Id.* at 1778.

153. United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

154. *Id.* ("[A]ny 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.").

155. *See* THE FEDERALIST NO. 51, at 357 (James Madison) (Benjamin F. Wright ed.,

The absolute deferentialism embedded in the rational basis test increased the risk of abuse by the federal government, at the expense of the states, because it gave Congress an unlimited power to regulate under the Commerce Clause.[156] In recent years, Congress has used this unlimited power to enact laws that have nothing to do with interstate commerce.[157] Believing that the doctrine of enumerated powers and federalism preserve to the people numerous advantages, *Morrison's* reaffirmation and extension of *Lopez* was necessary in light of several lower court decisions that viewed *Lopez* as an aberration.[158] Accordingly, this section will examine both the *Morrison* opinion in light of federal court decisions upholding the VAWA and the pragmatic effects that the dissenters' view would have on federalism, and will assert that the "aftermath" of *Morrison* will have a salutary impact on the federal courts' Commerce Clause analysis.

The Morrison Extension of Lopez—Correct and Overdue

After *Lopez*, the lower federal courts failed to apply the first judicially manageable limit on Congress' commerce power—the commercial/non-commercial distinction.[159] Although *Morrison* was not as dramatic as *Lopez*, it reaffirms, clarifies, and extends the important limits on Congress' powers enumerated in the Constitution in Article I, Section

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1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.").

156. Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 186-190 (1996) ("The adoption of the rational basis test in the context of the Commerce Clause is tantamount to an assertion that there is little risk to excessive federal action."). For example, the United States Court of Appeals for the Second Circuit recently found that federal law preempted municipal towing ordinances because "many cities are situated in close proximity to nearby states . . . it is reasonable to infer that municipal towing laws have, in the aggregate, a substantial effect on interstate commerce. We, of course, defer to the legislative will where any rational basis may be discerned for finding a substantial effect on interstate commerce from a given activity." Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765, 778 (2d Cir. 1999).

157. *See, e.g.*, The Female Genital Mutilation Act, 18 U.S.C. § 116 (1996); Machine Gun Ban, 18 U.S.C. § 922(o)(2)(B) (1998); Federal Arson Statute, 18 U.S.C. § 844(i) (1996); Bald Eagle Protection Act, 16 U.S.C. § 668 (1972).

158. *See infra* note 161 (listing VAWA cases that treated *Lopez* as an aberration). For a list of the advantages of the doctrine of enumerated powers and federalism see Gregory v. Ashcroft, 501 U.S. 452, 457-458 (1991) (listing the benefits of a federalist system of government and noting that "the constitutionally mandated balance of power between the States and Federal government was adopted by the Framers to ensure the protection of our fundamental liberties.") (internal quotation marks omitted).

159. *See supra* note 98. *See also infra* note 161.

8, clauses 3 and 18. *Morrison* was needed at this juncture in Commerce Clause history for two essential reasons: (1) to demonstrate why principled judicial review under the Commerce Clause is needed to place limits on Congress, notwithstanding the rationality of congressional findings; and (2) to clarify the substantial effects test so that it can be more aptly applied by the lower courts.

The enactment of section 13981, and subsequent federal court cases applying the Act, demonstrate why principled judicial review is needed under the Commerce Clause. The United States Court of Appeals for the Fourth Circuit and three district courts were the only four courts to follow *Lopez's* mandates and hold section 13981 unconstitutional.[160] All other federal courts found section 13981 constitutionally permissible because the legislative history of the VAWA provided a rational basis for Congress' conclusion that gender-motivated violence substantially affected interstate commerce.[161] While some deference to Congress by the courts is laudable, the federal court decisions upholding section 13981, post-*Lopez*, demonstrate that the "rational basis" test served only as a pretext for upholding *any* law passed by Congress under its commerce power.[162] Unchecked, deference is an abdication of the judiciary's role to impose limits on Congress' imperial tendencies.[163]

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160. *See Brzonkala III*, 169 F.3d 820 (4th Cir. 1999); *Brzonkala I*, 935 F. Supp. 779 (W.D. Va. 1996); Bergon v. Bergon, 48 F. Supp. 2d 628, 638 (M.D. La. 1999); Santiago v. Alonso, 96 F. Supp 2d. 58, 67-68 (D.P.R. 2000). The discussion in this section is limited to the lower federal courts applying and interpreting the VAWA, however, the discussion is generally applicable to all Commerce Clause challenges after *Lopez* because the Fourth Circuit was the only circuit court to uphold a Commerce Clause challenge after *Lopez*. *See supra* note 98.

161. *See* Culberson v. Doan, 65 F. Supp 2d. 701, 714 (S.D. Ohio 1999); Peddle v. Sawyer, 64 F. Supp 2d. 12, 18 (D. Conn. 1999) (finding section 13981 constitutional and allowing a claim for "supervisor liability" such as ones brought under 42 U.S.C. § 1983 under the VAWA); Williams v. Bd. of County Comm'rs of the Unified Gov't of Wyandotte County/Kansas City, Kan., No. 98-2485-JTM, 1999 WL 690101, at *2 (D. Kan. Aug. 24, 1999); Kuhn v. Kuhn, No. 98 C 2395, 1999 U.S. Dist. LEXIS 11010, at *30 (N.D. Ill. July 14, 1999); Ericson v. Syracuse Univ., 45 F. Supp 2d. 344, 348 (S.D.N.Y. 1999); Liu v. Striuli, 36 F. Supp 2d. 452, 478 (D.R.I. 1999); Doe v. Mercer, 37 F. Supp 2d. 64, 68 (D. Mass. 1999); Ziegler v. Ziegler, 28 F. Supp 2d. 601, 613 (E.D. Wash. 1998); Mattison v. Click Corp., No. CIV-A-97-CV-2736, 1998 WL 32597, at *7 (E.D. Pa. Jan. 27, 1998); Timm v. Delong, 59 F. Supp 2d. 944, 957-58 (D. Neb. 1998); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22305, at *8 (D. Kan. July 10, 1998); Anisimov v. Lake, 982 F. Supp. 531, 540 (N.D. Ill. 1997); Crisonino v. New York City Housing Auth., 985 F. Supp. 385, 396 (S.D.N.Y. 1997); Seaton v. Seaton, 971 F. Supp. 1188, 1194-95 (E.D. Tenn. 1997), *dismissed by* Seaton v. Seaton, No. 98-6645, 2000 U.S. App. LEXIS 12146, at *1 (6th Cir. May 30, 2000); Doe v. Doe, 929 F. Supp. 608, 616 (D. Conn. 1996).

162. *See supra* notes 156 and 157.

163. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("It is, emphati-

If the Constitution only required Congress to find that non-economic local activity has a substantial effect on the national economy, procedure would be exalted over substance. Indeed, the mere presence of legislative findings is the reason why so many federal courts upheld section 13981 under the rational basis test.[164] However, any competent legislative staff member, armed with a laptop and the Library of Congress, could compile a "mountain of data" and conclude that an activity substantially affects interstate commerce.[165] Although *Morrison* did not explicitly abolish the rational basis test, the Court indicated that the outer limits of the commerce power is ultimately a judicial rather than legislative question.[166]

Congress' legislative findings in *Morrison* demonstrate why the outer limits of the commerce power should be a judicial rather than legislative question.[167] The findings pertaining to the VAWA were irrelevant because they were a compilation of various statistics and reports dealing with the costs to the economy of non-gender related domestic violence, or violence against women generally. The only finding in the VAWA's legislative history that demonstrated that *gender-motivated* violence substantially affected interstate commerce was in a conclusory statement at the end of one House report.[168] Senator Biden, the VAWA's sponsor, even admitted that everyday domestic violence is not covered by section 13981.[169] If it is to remain true that "[e]very law enacted by

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cally, the province and duty of the judicial department, to say what the law is.").

164. *See supra* note 161. The VAWA was enacted before *Lopez* so it was not unreasonable for Congress to believe it had the power to enact section 13981 under its commerce power.

165. United States v. Morrison, 120 S. Ct. 1740, 1760 (2000) (Souter, J. dissenting) (referring to the legislative history of the VAWA as a "mountain of data"). *See also, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). In *Lucas*, a Takings Clause case, Justice Scalia noted tests which rely solely on legislative findings amount to "a test of whether the legislature has a stupid staff." *Id.* at 1026 & n.12. The quote is applicable to the rational basis test.

166. *See Morrison*, 120 S. Ct. at 1752 ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the Constitutionality of Commerce Clause legislation."). *See also* United States v. Lopez, 514 U.S. 549, 562 (1995) (the Court will conduct an "independent evaluation of constitutionality under the Commerce Clause . . . .").

167. *See supra* notes 112 and 113.

168. H.R. REP. NO. 103-711, at 385 (1994) ("[C]rimes of violence . . . 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 business . . . in places involved in interstate commerce. . . ."). *See also, e.g., Lopez*, 514 U.S. at 612 & n.2 (Souter, J., dissenting) (noting that the amended findings to the GFSA do nothing more than express "what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record."). The same can be said for the VAWA findings.

169. *See supra* note 113. This fact is also evidenced by the many cases where a plain-

Congress must be based on one or more of its powers enumerated in the Constitution," congressional findings, such as the unrelated ones relied on by Congress in enacting the VAWA, cannot control the fate of Commerce Clause legislation.[170]

In addition to demonstrating why principled judicial review is necessary under the Commerce Clause, *Morrison* also clarified the Court's definition of the substantial effects test when it declared that "substantial" is measured qualitatively, not quantitatively.[171] The rejection of total reliance on quantitative effects is indicated by the Court's failure to even mention the statistics Congress compiled outlining the quantitative costs of violence against women. The Court also clarified the meaning of the so-called "affectation doctrine" by limiting *Wickard's* cumulative effects doctrine to effects caused by local economic activity.[172] Many of the lower courts specifically concluded that *Lopez* was distinguishable because gun possession in a school zone, even in the aggregate, did not have a substantial effect on interstate commerce, while violence against women did.[173] *Morrison* cleared up this confusion—Congress still cannot aggregate the effects of non-economic activity. In short, the *Morrison* decision was needed so that "[w]e do not have to stand pat with a constitutional faith that rests on an incorrect vision of what government is and what it can do."[174]

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tiff failed to state a claim under section 13981 because the perpetrator had not demonstrated the requisite gender animus to distinguish the act of violence from a "random act of violence." *See* Doe v. Hartz, 134 F.3d 1339, 1341 (8th Cir. 1998); Braden v. Piggly Wiggly, 4 F. Supp 2d. 1357, 1362 (M.D. Ala. 1998); Truong v. Smith, 28 F. Supp 2d. 626, 632 (D. Colo. 1998); Dolin v. West, 22 F. Supp 2d. 1343, 1351 (M.D. Fla. 1998); Comardelle v. Hernandez, 26 F. Supp 2d. 897, 899 (E.D. La. 1998); Wesley v. Don Stein Buick, Inc., 985 F. Supp. 1288, 1300 (D. Kan. 1997).

170. United States v. Morrison, 120 S. Ct. 1740, 1748 (2000).

171. *See id.* at 1753 & n.6 (rejecting but-for causal chain of reasoning as applied to legislative findings). *See also* United States v. Lopez, 514 U.S. 549, 567 (1995) ("There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.").

172. *Morrison*, 120 S. Ct. at 1754. This is subject to the Court's qualification of this rule three pages earlier in the opinion noting that "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 1751.

173. *See supra* note 161. Specifically, the first case to uphold section 13981 relied almost exclusively on *Wickard* while brushing aside *Lopez*, and the majority of courts followed this opinion. Doe v. Doe, 929 F. Supp. 608, 612-16 (D. Conn. 1996).

174. Epstein, *supra* note 156, at 190.

The Substantial Effects of the Dissents' View on Federalism

As evidenced by the VAWA's legislative history and the lower court decisions upholding section 13981, gender-motivated violence, like any crime or tort, can be connected to the nationally economy.[175] However, this premise is significantly different from the notion that such activity substantially affects *interstate commerce.*[176] Justice Souter's view of federalism in his dissent in *Morrison*, particularly his Seventeenth Amendment argument, would completely obliterate the distinction between what is "truly national and what is truly local."[177] Section 13981 supplanted state law in two areas where the states traditionally have been sovereign—criminal law and civil tort law.[178] Section 13981 created a federal tort remedy for a criminal violation that "by its terms has nothing

175. The most illustrative example of this was the government's argument in *Lopez* that the mere *possession* of a gun in a school zone was connected to the national economy because it decreased the productivity of America's citizenry as whole. *See supra* note 93 and accompanying text.

176. The argument that section 13981 was an example of "cooperative federalism;" that is, it was a remedy intended to encourage and enhance the states' efforts to remedy gender-motivated violence by supplementing, rather than supplanting, state law through concurrent jurisdiction is tantamount to saying if Congress grants concurrent jurisdiction it can regulate any problem it deems sufficiently important. Congress has other powers, such as its spending power, which it can use to encourage states to alleviate the problem of gender-motivated violence by withholding federal funding or by providing grants to improve the problem. *See* United States v. New York, 505 U.S. 144, 166 (1992) ("This is not to say Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices."). However, just because Congress has some power to address the problem does not mean Congress can exercise its conferred powers without regard to the limitations contained in the Constitution.

177. United States v. Morrison, 120 S. Ct. 1740, 1754 (2000). *See also id.* at 1771-72 (Souter, J., dissenting) (Justice Souter's Seventeenth Amendment argument was essentially that the Amendment has altered the balance of power between the states and the federal government by decreasing state power. He noted that "[t]he Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power."). *But see* Gregory v. Ashcroft, 501 U.S. 452, 459 (1991) (Justice Souter joined the majority opinion in *Ashcroft* in which the Court stated: "One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this 'double security' is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only *if both are credible.* In the tension between federal and state power lies the promise of liberty.") (emphasis added).

178. *See* THE FEDERALIST NO. 17, at 169 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) ("There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in clear and satisfactory light,—I mean the ordinary administration of criminal and civil justice.").

to do with 'commerce' or any sort of economic activity."[179] Section 13981 supplanted state laws in several ways. First, states, both judicially and legislatively, have actively been reforming their tort law to effectuate a more sensitive approach to domestic abuse and violence against women; for example, including the tort of intentional infliction of emotional distress with a divorce claim.[180] Second, many state legislatures have passed "primary aggressor" statutes that take a comprehensive approach to evaluating and policing the continual interactions in domestic abuse cases.[181] Third, every state has a civil action for assault and for battery, and the vast majority of states have adopted the tort of intentional infliction of emotional distress.[182] Fourth, section 13981 provided a longer statute of limitations than the majority of states, most of which have a two-year statute of limitations on tort claims.[183] Finally, section 13981 displaced state law in those states which retain interspousal immunities and evidentiary rules.[184]

The logical limitations of the dissenters' federalism views can be illustrated by using interspousal immunity laws as an example.[185] A state interspousal immunity law, however debatable on the merits, is a public policy choice by the state. If the citizens of the state want to change the law, they should go to their more accessible *local* legislature to effectuate that change. Providing a federal remedy in an area of traditional state authority blurs the lines of political accountability and increases the likelihood that political responsibility will become illusory.[186] Moreover,

179. United States v. Lopez, 514 U.S. 549, 561 (1995).

180. *See* Mary C. Carty, Comment, *Doe v. Doe and the Violence Against Women Act: A Post-Lopez Commerce Clause Analysis*, 71 ST. JOHN'S L. REV. 465, 467 & n.7 (1997) (listing state court decisions where courts have shown a more sensitive response to violence against women).

181. *See, e.g.*, CAL. PENAL CODE § 836(C)(3) (West 1985 & Supp. 2000); COLO. REV. STAT. ANN. § 18-6-803.6(2) (West 1999); FLA. STAT. ANN. § 741.29(4)(b) (West 1977 & Supp. 2000); IOWA CODE ANN. § 236.12 (West 2000); MICH. COMP. LAWS ANN. § 776.22(b)(ii) (West 2000); N.Y. CRIM. PRO. LAW § 140.10(4)(c) (Consol. Supp. 2000); S.C. CODE ANN. § 16-25-70(D) (Law Co-op. 1998 & Supp. 2000); UTAH CODE ANN. § 77-36-2.2(3) (1999). This list is not meant to be comprehensive.

182. *See* Brief for State of Alabama Amicus Curiae in Support of Respondents at 13 & Appendix A, United States v. Morrison, 120 S. Ct. 1740 (2000) (listing every state that has adopted the torts of battery, assault, intentional infliction of emotional distress, and various criminal laws, such as anti-stalking).

183. *See* 28 U.S.C. § 1658 (1994) (providing for a four-year limitations period in federal causes of action unless otherwise provided by law).

184. GA. CODE ANN. § 19-3-8 (1999); LA. REV. STAT. ANN. § 9:291 (West 2000).

185. *See* Brief for State of Alabama Amicus Curiae in Support of Respondents, at 13 & Appendix A, *Morrison*, 120 S. Ct. 1740.

186. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 564 (1995) ([S]tates have historically been sovereign in areas of criminal law); Rose v. Rose, 481 U.S. 619, 625 (1987) (The Court has consistently recognized that domestic relations law belongs to the

Congress has the ability to preempt state laws that come into conflict with federal statutes if it is acting within its enumerated powers.[187] Therefore, if Congress had the power under its commerce authority to enact section 13981, it would have the power to displace all state laws in the field if it so desired. This displacement would effectively prohibit states from performing "their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[188] Justice Souter's dissent in *Morrison* failed to recognize sufficiently that states traditionally have been sovereign in the area of domestic violence and, as noted above, are attempting to curb violence against women by experimenting with a variety of statutes.[189] Congress is susceptible to the political whim of the moment, and it would have been an abdication of the Court's responsibility not to declare section 13981 unconstitutional.[190] Congress does not advance the cause of liberty in the long run

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laws of the States and not the United States); Sosna v. Iowa, 419 U.S. 393, 404 (1975) (same); Thompson v. Thompson, 484 U.S. 174, 186 & n.4 (1988) (same); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (recognizing states' traditional authority to provide tort remedies to its citizens); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426 (1821) (Congress has no right to punish murder committed within any states and "[i]t is clear, that Congress cannot punish felonies generally."). *See also Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (Justice Kennedy noted that "[t]he resultant inability to hold either branch of government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.").

187. *See, e.g.*, City of New York v. Federal Communications Commission, 486 U.S. 57, 63 (1988) ("When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes.").

188. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). In fact, there are several social policy reasons for allowing states to control domestic relation laws, rather than the federal government, apart from the obvious ones already mentioned such as it is an area of traditional state sovereignty and a complex problem that requires more than one federal tort statute to remedy. As one commentator has noted, state legislatures and courts draw upon the community values and norms in enacting such laws and federal displacement of those laws has the deleterious effect of installing an ideal of national supremacy over the states by causing them to surrender one of the last substantive legal areas within the state's exclusive control. *See* Anne C. Daily, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

189. *But cf.* United States v. Morrison, 120 S. Ct. 1740, 1770 (2000) (Souter, J., dissenting) (Justice Souter did quote the often cited passage from *Gibbons* noting that the Framers intended the political process control the limits and extensions of federalism). *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.").

190. *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) ("[T]he absence of structural mechanisms to require those officials [Congress] to undertake this principled task, and

by creating a politically popular statutory right at the expense of a fundamental Constitutional principle.

The Aftermath of United States v. Morrison

The dust has not quite yet settled from the decision in *Morrison*, but one thing is clear: non-economic activity cannot be regulated under the cumulative effect rationale of *Wickard* and *Perez*.[191] This principle will call into question many federal laws. *Morrison* will have a positive impact in the long run on the federal courts by limiting federal dockets particularly in light of Congress' recent penchant for enacting federal criminal laws.[192] However, in the meantime *Morrison* may have the effect of creating a host of judicial challenges to federal laws.[193] The federal courts are sure to be full of *Morrison* challenges to federal statutes in the upcoming year, and as the long, rocky history of Commerce Clause jurisprudence aptly demonstrates—only time will tell how *Morrison* will fare.

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the momentary political convenience often attendant upon their failure to do so, argue against complete renunciation of the judicial role.").

191. *Morrison*, 120 S. Ct. at 1754. Admittedly, Congress still has a broad power to regulate interstate commerce and the *Morrison* decision will not have the effect of limiting many of the Civil Rights laws enacted by Congress because if it attaches a jurisdictional element demonstrating that the federal cause of action is in pursuance of its power to regulate interstate commerce, such as it did with the Civil Rights Act of 1964, the legislation will be upheld under a *Morrison* analysis.

192. *See, e.g.*, Michelle W. Easterling, Note, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933 (1996); Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*; 47 CASE W. RES. L. REV. 921 (1997); Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997); Kathleen F. Bricky, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801 (1996). The *Morrison* decision will also address the Chief Justice's concerns about the expanding federal docket, which is a policy consideration that likely affected his decision in both *Lopez* and *Morrison*. *See* William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1660 (1992) (recognizing that "the issue here is not about whether gun crimes or violence against women should be severely and properly punished. Rather the issue is whether federal courts should be further burdened with another area of overlapping litigation that state courts have already competently handled."). *See also* Charles B. Schweitzer, Comment, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 71 (1995).

193. *See* United States v. Min Nan Wang, No. 98-6490, 2000 U.S. App. LEXIS 18546, at *17 (6th Cir. Aug. 3, 2000) (reversing a robbery conviction under the Hobbs Act relying on *Morrison*). *But see* Allied Local and Reg'l Mfrs. Caucus v. Environmental Protection Agency, 215 F.3d 61, 83 (D.C. Cir. 2000) (upholding Clean Air Act under *Morrison* challenge).

CONCLUSION

The *Morrison* decision correctly held that section 13981 was an impermissible exercise of Congress' Commerce Clause power. The dissenters criticized the majority for formalistic line drawing; however, the Court is obligated to draw a line somewhere if the enumeration of powers in Article I presupposes something not enumerated. *Morrison*, by limiting the cumulative effects test, and by requiring independent judicial review of legislation regulating non-economic activity enacted under Congress' commerce power, re-established the judiciary as the final arbiter in Commerce Clause cases. Federalism requires due respect for both spheres of government and a distinction between what is national and what is local. Section 13981 tipped this scale too far in favor of the federal government. *Morrison* restored the healthy federal-state balance that is required by a core principle: Congress' powers are enumerated and limited for the protection of our liberty.

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