September 1997

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The Violence Against Women Act After United States v. Lopez: Defending the Act from Constitutional Challenge

Megan Weinstein†

INTRODUCTION

In a surprising turn in modern Commerce Clause jurisprudence, the Supreme Court, in the 1995 case of United States v. Lopez,1 held that the Gun-Free School Zones Act unconstitutionally exceeded the authority of Congress to regulate commerce. The Lopez holding has made many federal statutes vulnerable to constitutional challenge as improper exercises of Commerce Clause power, among them the civil rights provision of the Violence Against Women Act of 1994 ("VAWA").2 In fact, since Lopez, this provision of VAWA has been challenged in two federal district courts.3 In one of these cases, Brzonkala v. Virginia Polytechnic & State University, the court dismissed the plaintiff's VAWA claims against her two alleged rapists on the ground that VAWA's civil rights provision was unconstitutional.4 This holding is dire because it establishes a precedent for holding the civil rights provision of VAWA unconstitutional that may foretell its ultimate repudiation by higher courts, and that is likely to discourage women from bringing VAWA claims.

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2. The civil rights provision of VAWA was passed "[p]ursuant to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution [the Commerce Clause]." Civil Rights Remedies for Gender Motivated Violence Act, 42 U.S.C. § 13981 (1994) [hereinafter section 13981]. Although the Act has been challenged as an improper exercise of both Fourteenth Amendment and Commerce Clause power, this article will concern itself exclusively with Commerce Clause challenges to the Act under Lopez.

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In this article, I will briefly describe VAWA, detailing both its attributes and its shortcomings. I will argue that the civil rights provision of VAWA is distinguishable from the Gun-Free School Zones Act held unconstitutional in *Lopez*, and I will establish a framework for arguing the constitutionality of the provision under the standards enunciated in *Lopez*. This article is premised on the assumption that the civil rights provision of VAWA, although an imperfect solution to the problem of violence against women, needs to be maintained. More broadly, this article seeks to articulate, against a backdrop of a national epidemic of violence against women, why federal efforts to protect women from violence are constitutional.

**DESCRIPTION OF VAWA**

VAWA is most noted for its creation of a federal civil rights cause of action against persons who commit crimes of violence motivated by gender animus under section 13891.6 While this provision is the focus of this article, it is important to describe briefly the other objectives that VAWA achieves, both because such a discussion will help elucidate the broader legislative purpose in enacting VAWA and because it will demonstrate the significance of the Act of which the civil rights provision is a part.

Among other accomplishments, VAWA makes orders of protection enforceable in all states;7 extends protection to battered immigrant women by allowing them to self-petition for permanent residence in the U.S.8 and by allowing them to apply for suspension of deportation;9 makes it a federal offense to cross state lines with the intent to injure, harass, or intimidate a spouse or intimate partner if the traveler causes injury to his or her spouse or intimate partner;10 and conditions the receipt of federal money on a state’s commitment to arresting and prosecuting domestic violence offenders.11 These provisions of VAWA demonstrate that, in enacting VAWA, Congress recognized the pervasiveness of violence against women; as well as the failure of individual states to deal adequately with this problem.

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5. Former Surgeon General Everett Koop has identified violence against women by their intimate partners as the most pressing health problem for women in the United States. Everett Koop, *Comments to the American College of Obstetricians and Gynecologists* (Jan. 3, 1989).
9. See 8 U.S.C. § 1254(a)(3) (1994) (stating that Attorney General may suspend deportation of person who, in addition to meeting other statutory requirements, “has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subject to extreme cruelty in the United States by such citizen or permanent resident parent?”).
Despite VAWA's strengths, the Act is not a complete or unproblematic response to violence against women. The civil rights provision in particular is troublesome because it is only relevant to middle and upper-class battered women who have the resources to bring claims against their batterers and who have wealthy batterers from whom any potential recovery would be meaningful. Moreover, the civil rights provision appears to provide no recourse for lesbians who are beaten by their partners, and it remains to be seen if battered women can effectively demonstrate that the violence against them is motivated by gender animus. These are significant shortcomings that should be addressed by future reform efforts. VAWA as a whole, however, marks a significant shift away from the notion that violence against women is a private problem that does not mandate governmental intrusion. On the contrary, VAWA recognizes the many manifestations that violence against women takes in the lives of women, and the need for meaningful governmental efforts to protect women. Accordingly, any effort to undermine provisions of VAWA, such as that represented by the Brzonkala decision, should be met with strong opposition.

UNITED STATES v. LOPEZ

In Lopez, the Court held that the Gun-Free School Zones Act, which made it a federal offense for any individual to knowingly possess a firearm within an area that such individual knew or had reasonable cause to believe was a school zone, was an unconstitutional exercise of Congress's Commerce Clause authority. In so holding, Chief Justice Rehnquist, speaking for the Court, identified three areas of activity that Congress may properly regulate under the Commerce Clause. First, the Court held, "Congress may regulate

12. See Andrea Brenneke, Civil Rights Remedies for Battered Women: Axiomatic & Ignored, 11 LAW & INEQ. J. 1, 65, 71 (1992) (noting that VAWA claims will not overwhelm federal courts because "private lawsuits are not practicable unless the defendant has income or assets" and because of "financial limitations inherent in bringing private law suits").


14. See id. at 261-62 (arguing that because the civil rights provision expressly exempts crimes motivated by personal animosity, it may not cover "typical wife abuse"). See generally Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 784-85 (W.D. Va. 1996) (noting that evidence of defendant's general disrespect for women was necessary to sustain plaintiff's otherwise "conclusory statement" that rape against her was motivated by gender animus).

15. See, e.g., Joan Zorza, The Criminal Law of Misdemeanor Domestic Violence, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) (stating that "[t]hroughout the 1970s and early 1980s, [police] officers believed and were taught that domestic violence was a private matter, ill suited to public intervention").


17. Rehnquist's opinion was joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with Justice Kennedy filing a concurring opinion in which Justice O'Connor joined, and Justice Thomas filing a separate concurring opinion. Justices Breyer, Souter, Stevens, and Ginsburg dissented.

the use of the channels of interstate commerce."\(^1\) Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce."\(^2\) Finally, Congress may "regulate those activities having a substantial relation to interstate commerce . . . i.e. those activities that substantially affect interstate commerce."\(^3\) As the constitutionality of the civil rights provision of VAWA can be established only under the final category,\(^4\) this article will focus exclusively on the Court's discussion of the third prong of Commerce Clause analysis.

Having concluded that the Gun-Free School Zones Act could arguably be upheld only under the third line of analysis,\(^5\) the Court appeared to rely on four factors in holding that the Act failed this test. First, the Court distinguished between regulation of commercial and non-commercial activities, holding that regulation of intrastate activity is only justified under the Commerce Clause where the intrastate activity is commercial.\(^6\) The Gun-Free School Zones Act did not satisfy this requirement because it was "a criminal statute that by its terms [had] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."\(^7\) Second, the Court critiqued the Gun-Free School Zones Act for failing to contain a "jurisdictional element" that would have explicitly linked each instance of firearm possession to interstate commerce.\(^8\) Third, although the Court asserted that congressional findings as to the connection between the regulated activity and interstate commerce were not required, it implied that where "no such substantial effect was visible to the naked eye," as was the case with the Gun-Free School Zones Act, the absence of such findings in either the statute or the legislative history made it more difficult to defer to congressional judgment.\(^9\) Finally, the Court concluded that the government's rationale for finding a connection between interstate commerce and gun possession in school zones was overly expansive;\(^10\) to countenance the government's assertions, the Court would have had to "pile inference upon inference in a manner that would bid fair to convert congressional authority

\(^{19}\) Id. at 1629.
\(^{20}\) Id.
\(^{21}\) Id. at 1629-30.
\(^{22}\) See Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 786 (W.D. Va. 1996) ("[I]f VAWA is a permissible exercise of power under the Commerce Clause, it must qualify for the third category: it must regulate an activity that has a substantial effect on interstate commerce."); Doe v. Doe, 929 F. Supp. 608, 612 (D. Conn. 1996) (stating that the court's discussion is "limited to this third area of regulatory activity").
\(^{23}\) See Lopez, 115 S. Ct. at 1630.
\(^{24}\) See id.
\(^{25}\) Id. at 1630-31.
\(^{26}\) See id. at 1631-32.
\(^{27}\) See id. at 1632.
\(^{28}\) The government contended that gun possession in school zones leads to violent crime, which has a negative impact on the national economy. That impact could be seen in two ways. First, the costs of crime are shouldered by the national population through higher insurance costs. Second, violence in schools hampers student learning, which results in less productive workers and thus, an impaired economy. See id.
RECENT DEVELOPMENTS

under the Commerce Clause to a general police power of the sort retained by the States.”

IMPORT OF LOPEZ FOR THE CIVIL RIGHTS PROVISION OF VAWA

Commentators generally agree that Lopez is an important, but “narrow decision that will invalidate few congressional acts.” Indeed, despite Lopez, lower courts have continued to uphold broad congressional statutes under the Commerce Clause. In addition, it is noteworthy that the Lopez Court did not explicitly reject the deferential standard of rational basis review for analyzing Commerce Clause cases. Although it appears that after Lopez, the Court will impose a somewhat “toughened rational basis” standard for judging Commerce Clause challenges, it is likely that such a standard will nevertheless keep “the level of judicial inquiry far below the strict or intermediate levels of scrutiny used in some equal protection cases.” Lastly, the expressions of loyalty to Commerce Clause precedent made by Justices O’Connor and Kennedy, two critical votes in the Lopez decision, as well as their observation that Lopez is a “limited” holding, suggest that slight changes in factual scenarios might tilt the balance toward upholding congressional statutes in future cases.

Despite these indications that Lopez will not change the outcome of most Commerce Clause cases, it is important to take the Court at its word and analyze the civil rights provision of VAWA under the four analytical categories identified by the Lopez Court in its discussion of the “substantially affecting commerce” prong of Commerce Clause jurisprudence. Perhaps the most pressing task is to confront what appears to be the Court’s greatest concern: Is there a way to uphold section 13981 without abandoning all limits on Congress’s power under the Commerce Clause? As the following discussion will reveal, this question, along with the Court’s other concerns, can

29. Id. at 1634.
30. Deborah Jones Merritt, Commerce!, 94 Mich. L. Rev. 674, 692 (1995). See also H. Jefferson Powell, Enumerated Means and Unlimited Ends, 94 Mich. L. Rev. 651, 651-52 (1995) (“[T]he main effect of Lopez is very likely to be nothing more than a renewed congressional interest in loading federal criminal statutes with findings and ‘jurisdictional elements’ . . . . Lopez, in short, may have little effect on the post-1937 norm of congressional omnicompetence.”); Regan, supra note 1, at 554 (“I do not think Lopez is likely to inaugurate a major change in the Court’s inclination to uphold federal legislation.”).
31. For a thorough discussion of lower courts’ treatment of Commerce Clause cases after Lopez, see Merritt, supra note 30, at 712-28.
32. See Lopez, 115 S. Ct. at 1629, 1631-33 (discussing modern precedents that have relied on rational basis test for determining whether regulated activity substantially affects interstate commerce).
33. Merritt, supra note 30, at 677.
34. Id. at 684.
35. See Lopez, 115 S. Ct. at 1637 (Kennedy, J., concurring).
36. Id. at 1634 (Kennedy, J., concurring).
37. For a demonstration of the importance of this question to the Court see Lopez, 115 S. Ct. at 1632-34 (majority opinion), 1640 (Kennedy, J., concurring), 1642, 1649-51 (Thomas, J., concurring), 1661-62 (Breyer, J., dissenting); see also Merritt, supra note 30, at 685 (stating that Court’s “key concern” is “that the Commerce Clause know some limits”).
be answered in a way that sufficiently distinguishes *Lopez* and demonstrates the constitutionality of this section of VAWA.

1. The Commercial/Non-Commercial Distinction

To be constitutional under the *Lopez* rationale, the intrastate instances of violence against women that section 13981 seeks to regulate must be deemed commercial. On its face, this section appears to regulate "commercial" conduct no more than did the Gun-Free School Zones Act. Upon closer inspection, however, it is clear that the direct and significant economic toll that violence against women exacts on women and their employers is sufficient to demonstrate the commercial nature of violence against women.

After conducting hearings on violence against women and its impact on interstate commerce, the Senate Judiciary Committee found that "[v]iolence is the leading cause of injury to women ages 15-44, more common than automobile accidents, muggings, and cancer deaths combined."38 On the basis of such alarming statistics, the committee concluded that "[g]ender-based crimes and fear of gender-based crimes restricts movement [and] reduces employment opportunities . . . [g]ender-based violence bars its most likely targets—women—from full partic[ipation] in the economy."39 As an example of the impact of violence on women as workers, the Senate committee cited studies indicating that almost fifty percent of rape survivors quit or are fired from their jobs in the aftermath of the rape.40 The House of Representatives report similarly concluded that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce."41 Thus, it is evident that a primary concern of the legislators who passed VAWA was the negative effect that violence against women has on victims' employment opportunities, and the subsequent damage inflicted on interstate commerce.

One commentator has noted that the Court in *Lopez* may have insisted upon the distinction between commercial and noncommercial activity because it believed that "the workplace is more closely tied than other locales to interstate commerce."42 Section 13981, although it does not directly regulate workplaces, clearly seeks to protect not only women workers, but also their workplaces, from the high economic costs that violence

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39. Id. at 54.
40. See id.
42. Merritt, supra note 30, at 709.
against women employees exacts. Supreme Court precedent demonstrates that this kind of direct interference with interstate businesses can be remedied by congressional action under the Commerce Clause. As early as 1956, the Court held that the federal government could punish criminals who rob or extort interstate businesses, and in the same term that *Lopez* was decided, the Court held that a federal arbitration law could be applied to the customer of a local business that operated in interstate commerce. In both instances, the element that gave rise to federal Commerce Clause power was the interference with interstate businesses, an interference which was no more severe than that created by widespread violence against women.

Unlike the Gun-Free School Zones Act, which sought to protect students, as potential employees, and their future employers from the negative effects of gun violence, section 13981 seeks to protect women, as actual employees, and their present employers from the costly effects of violence. While the former argument relies on a hypothesized employment relationship and a largely hypothesized future effect on the workplace, the latter argument relies on existing evidence of widespread interference with present employment relationships. Although the *Brzonkala* Court decried reliance on such a "step of causation analysis," it seems that it is precisely this kind of careful parsing that is required in order to determine if an activity "substantially affects interstate commerce." As making such a determination is not an exact science, *Lopez* "merely requires [courts] to locate conduct on a spectrum of activities that are more or less commercial." Although at first glance, violence against women would not appear to be commercial behavior, its natural consequence—the imposition of significant financial costs on women victims and their employers—demonstrates that violence against women falls within the commercial side of the spectrum.

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43. For a discussion of the fiscal impact of domestic violence on workplaces, see Joan Zorza, *Women Battering: High Costs of the Law*, in DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES, supra note 13, at 49 (citing studies that estimate annual costs of domestic violence to employers at $3-$13 billion).


46. See id. at 837; Green, 350 U.S. at 420.

47. See *Brzonkala*, 935 F. Supp. at 790-91.

48. Merritt, supra note 30, at 694 n.85; see also *Lopez*, 115 S. Ct. at 1633 (1995) (stating that "question of congressional power under the Commerce Clause 'is necessarily one of degree'" (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937))).

49. I have not spent any time pursuing the other obvious argument for the proposition that violence against women is commercial: that women who are victims of violence will, because of fear and/or injuries, not travel interstate as frequently and thus will not contribute as much to the interstate economy as they otherwise would. There is precedent for this argument in the cases of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). A similar argument was made in *Lopez*, and although it was not explicitly rejected by the Court, it alone was obviously insufficient to sustain the Gun-Free School Zones Act. See *Lopez*, 115 S. Ct. at 1632. Thus, while such an argument may be worth pursuing in future cases, it should be buttressed by the argument elucidated above. The above argument is stronger because it implicates workplaces, which, as we have seen, may evoke special judicial solicitude. See supra text accompanying notes 42-46. In addition, workplaces, in the aggregate, occupy a critical place in the national economy and, unlike the financial effects of violence on interstate travel, the financial effects of violence on workplaces are easily measurable.
2. The Jurisdictional Element

The jurisdictional element factor presents perhaps the most difficult challenge for those seeking to defend the civil rights provision of VAWA because this provision does not contain a jurisdictional element. In other words, there is nothing in section 13981 to suggest that women can only seek recovery from men who inflicted violence against them which affected their jobs, or that only women who were employed by interstate businesses at the time the violence occurred can recover. While the lack of a jurisdictional element was an important factor in the Court’s decision in Lopez, it remains unclear if a jurisdictional element is an absolute requirement for statutes passed pursuant to the Commerce Clause.\textsuperscript{50} Even if it were required, however, the omission of a jurisdictional element in section 13981 may not be fatal.

Justice Kennedy’s concurrence in Lopez recommits the Court to a practical understanding of the commerce power according to which “Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable economy.”\textsuperscript{51} In addition, the Court has long been committed to the principle that Congress may regulate acts that alone would not have a substantial effect on interstate commerce if such acts in the aggregate would have the requisite substantial effect.\textsuperscript{52} Moreover, Congress may include in the aggregate “instances that it is too difficult or inconvenient to distinguish from [those instances that do have some effect on commerce], even if the additional instances on their own have no effect on commerce whatsoever.”\textsuperscript{53} According to these principles, if violence against women is treated as commercial behavior, as I have argued it should be, a jurisdictional element is implicit in the Act. Congress could regulate violence against women under the assumption that such violence, when viewed in the aggregate, substantially affects our national “single market,” even if it appears in some individual instances to have only a slight impact or to be directed only towards purely local businesses. Under this theory, it would be both tedious and unnecessary for Congress to require a demonstration of the impact on interstate commerce in every instance of violence against women. Such an understanding of Congress’s Commerce Clause power, the national economy and section 13981 eliminates the need for an explicit jurisdictional element in the statute.

\textsuperscript{50} See Brzonkala, 935 F. Supp. at 792.
\textsuperscript{51} Lopez, 115 S. Ct. at 1636-37 (Kennedy, J., concurring).
\textsuperscript{52} The first, and most famous, articulation of this theory was in Wickard v. Filburn, 317 U.S. 111 (1942) (upholding application of Agricultural Adjustment Act to local farmer although his individual contribution to demand for wheat was “trivial”).
\textsuperscript{53} Regan, supra note 1, at 561 (citing Perez v. United States, 402 U.S. 146, 154 (1971)).
3. Legislative Findings

Although the *Lopez* Court insisted that legislative findings demonstrating the link between gun possession in school zones and interstate commerce were not necessary to sustain the Gun-Free School Zones Act, the Court was clearly disturbed by the absence of such findings in the Act.\textsuperscript{54} As the Court noted, such findings allow the Court to "evaluate the legislative judgment that the activity in question substantially affected interstate commerce."\textsuperscript{55} Perhaps more importantly, by showing that Congress has carefully assessed the regulated activity's impact on interstate commerce as a prerequisite to intervention, such findings help demonstrate that Congress takes seriously the limits on its Commerce Clause power.

Unlike the Gun-Free School Zones Act, VAWA is replete with congressional findings as to the impact of violence against women on interstate commerce.\textsuperscript{56} In fact, as the *Doe* Court noted, in considering whether to enact VAWA, Congress conducted extensive hearings on the deleterious impact of gender-based violence on interstate commerce.\textsuperscript{57} This legislative history, in conjunction with the congressional findings, will demonstrate to future courts that, in enacting VAWA, Congress considered the limits on its Commerce Clause power and enacted the law in light of compelling evidence of the substantial effect of violence against women on interstate commerce.

4. Limiting Congress's Commerce Clause Power

As was noted above, perhaps the Court's gravest concern after *Lopez* is that Congress's Commerce Clause power know some clear bounds. The Court's very insistence that regulated activity be shown to substantially affect interstate commerce reflects this concern. The argument that has been advanced for sustaining the civil rights provision of VAWA—that it regulates commercial activity because of the significant and direct commercial impact of violence against women and that the jurisdictional element is implicit in it—does not rely on a rationale of unlimited congressional power. Indeed, the limits of this argument can be demonstrated quite forcefully.

The argument for the constitutionality of section 13981 does not depend on the attenuated assertion that violence against women, by decreasing women's travel and spending, will decrease the number of goods crossing state lines and thus, will exert a negative influence on interstate commerce. Rather, it depends on the contention that violence against women seriously impairs our national economic productivity, surely a concern within Congress's purview. As Professor Regan notes in his discussion of Commerce Clause jurisprudence after *Lopez*:

\begin{itemize}
\item \textsuperscript{54} See id. at 1631.
\item \textsuperscript{55} Id.
\item \textsuperscript{57} See Doe, 929 F. Supp. at 611.
\end{itemize}
the idea that Congress can act against serious threats to the productivity of the economy in general—or even against threats to any essential sector—is much narrower than the current idea that Congress can regulate whatever "affects commerce." The mere fact that some local law or practice reduces the quantity of goods moving across state lines, for example, does not mean it is a threat to our national economic viability that Congress can act against.  

Stating that violence against women can be regulated because it significantly threatens our national economic viability is thus not to argue that Congress’s Commerce Clause power is unlimited. The limitations on Congress’s power under this framework are, in fact, two-fold: the regulated activity must pose a threat to national economic productivity and that threat must be significant or even "substantial" before Congress can act.  

The limitation that Congress can only act when the regulated activity poses a serious threat to our national productivity also makes an explicit jurisdictional element in a statute unnecessary. As Congress would only be empowered to act in the face of a threat to the viability of the economy as a whole, a connection to interstate commerce would be presumed when Congress acted under the Commerce Clause. Of course, I do not mean to suggest that an explicit jurisdictional element would be improper, only that it would not be essential. Thus, even under a restrained Commerce Clause theory, the civil rights provision of VAWA is a proper exercise of Congress’s power, despite the omission of an explicit jurisdictional element, because violence against women seriously threatens our national productivity.  

Professor Regan suggests a further limitation on Congress’s Commerce Clause power. He contends that even where there is a threat to national productivity, Congress should not be empowered to act if the states are as well situated and as adequately motivated as Congress to confront the problem.  

Discussing Lopez, he argues that although congressional intervention was justified to address the threat to national productivity that a weak educational system poses, Congress ultimately had no power to act because the states were not incompetent to do so. Justice Kennedy, in his concurring opinion in Lopez, appeared to share Regan’s concern about state competence, stating:

If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the

58. Regan, supra note 1, at 580.
59. In Lopez, the Court appears to reject a national productivity rationale for sustaining congressional action. See Lopez, 115 S. Ct. at 1632. It does so, however, because it finds that under such a theory, "it is difficult to perceive any limitation on federal power." Id. This article attempts to answer the Court's concern. First, the article argues that a national productivity theory of Commerce Clause power does indeed contain real limitations on Congress's power. See supra and infra text accompanying notes 58-60. Second, the article accepts an additional "state incompetence" limitation on federal power under the national productivity theory. See infra text accompanying notes 61-66.
60. I am of course only speaking about the "affecting commerce" prong of Commerce Clause doctrine. If an activity can be regulated properly under one of the first two categories identified in Lopez, the regulation would not have to be justified by such a threat.
61. See Regan, supra note 1, at 580-81.
62. See id.
reserved powers of the states are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.63

The Justice was clearly bothered that the federal government was attempting to regulate in an area where the states had sufficient power to enact their own regulations and, in fact, most had done so.

Accepting the additional “state incompetence” limitation on Congress’s Commerce Clause power, it is still clear that the civil rights provision of VAWA is an appropriate exercise of Congress’s power. One of Congress’s motivations for enacting VAWA was its perception, based on studies of gender bias in state courts,64 that states were dealing inadequately with the problem of violence against women. The House of Representatives report stated that “[s]tate and [f]ederal laws do not adequately protect against the bias element of crimes of violence motivated by gender... nor do these [laws] adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests.”65 The Senate report similarly concluded that “[t]raditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men.”66 These remarks suggest that the states suffer from a particular form of incompetence in the area of protecting women from violence, namely an unwillingness to adequately prosecute and punish these crimes. Such a shortcoming creates a need for federal intervention that is sufficient to overcome Professor Regan’s second limitation on Congress’s Commerce Clause power.

As the foregoing discussion demonstrates, the civil rights provision of VAWA can be upheld under a theory that proposes real limits on Congress’s Commerce Clause power. Accordingly, unlike in Lopez, the courts need not fear that sustaining this provision is equivalent to abandoning the mandate of enumerated powers.

5. Additional Factors

Justice Kennedy’s concurrence in Lopez raises two additional factors that, although not highlighted in the majority opinion, are worth considering. The first—that congressional exercises of Commerce Clause power have greater justification when the states are incompetent to act against a problem—was detailed above. The second factor articulated by Kennedy’s concurrence, and noted in the majority opinion, was that of preserving traditional

63. Lopez, 115 S. Ct. at 1641 (Kennedy, J., concurring); see also Merritt, supra note 30, at 702-03 (“In each of [the] cases [that endorse a broad construction of the Commerce Clause], federal regulation addressed a problem that not only was important but that could not be or was not being addressed by the states.”).
enclaves of state power. In particular, the Court expressed doubts about federalizing areas such as family law. For the following reasons, section 13981 does not implicate either of these concerns.

The Court itself acknowledged that even in areas where states have traditionally been sovereign, there is no absolute immunity from federal intervention. As we saw in the discussion of state incompetence, there occasionally may be good reasons for the federal government to invade the province of the states. In addition, the failure of the Court to satisfactorily define areas of traditional state concern in the past cautions against relying on such a theory. Nonetheless, even if one takes seriously the concern about respecting state authority over areas in which states have traditionally been sovereign, one sees that section 13981 does not pose a threat to state authority in the areas of criminal law enforcement, tort law, or family law.

First, section 13981 creates a civil cause of action against people who commit gender-based violence. It therefore supplements rather than supplants any state criminal action against a violator. The Brzonkala Court’s insistence that VAWA is “criminal in nature” simply because the statute was meant to address deficiencies in state criminal justice systems is plainly wrong; the motivations of Congress cannot alone transform a civil statute, which involves action by private individuals, into a criminal statute, which involves action by the state. Secondly, as the Doe Court makes clear, the civil rights provision of VAWA does not replace state tort actions; rather, it recognizes an additional “federal civil right, with attendant remedies, which is distinct in remedy and purpose from state tort claims.” Finally, Congress specifically declined to federalize family law through the mechanism of section 13981 by including a provision that it should not be construed “to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.”

In short, because section 13981 creates a civil cause of action that supplements, rather than replaces state criminal or tort laws, and because Congress explicitly refused to use this provision to federalize family law, any argument that it is an improper extension of Congress’s Commerce Clause power because it invades areas of traditional state concern is untenable.

67. See Lopez, 115 S. Ct. at 1640-42 (Kennedy, J., concurring), 1631 n.3.
68. See id. at 1632-33.
69. See id. at 1633 (“We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process.”).
72. See Brzonkala, 935 F. Supp. at 790.
73. Doe, 929 F. Supp. at 616.
CONCLUSION

Lopez undoubtedly changes the landscape of Commerce Clause jurisprudence. How profound the change will be remains to be seen. It is clear, however, that in making judgments about what “substantially” affects interstate commerce, the Court will struggle to identify and impose meaningful limits on Congress’s Commerce Clause power. Because these questions involve qualitative and “delicate” judgments, the future of section 13981 is not entirely certain.

This article has attempted to set forth, within the parameters set out by the Lopez Court, a compelling case for the constitutionality of the civil rights provision of VAWA. It is hoped that the arguments presented here will inspire additional ideas about how to defend this provision. Although section 13981 is not a comprehensive solution to the problem of violence against women, its constitutional defeat would have negative consequences. Not only would the opportunity to remedy its deficiencies be lost, but the federal government would lose an important tool in its efforts to eradicate violence against women.

75. Lopez, 115 S. Ct. at 1640 (Kennedy, J., concurring).