NOTE

VAWA After *Lopez*: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of *Brzonkala v. Virginia Polytechnic and State University*

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INTRODUCTION

On the night of September 21, 1994, two men gang raped Christy Brzonkala in her college dormitory room.[1] After she complained to the University's judiciary committee,[2] the committee accepted a guilty plea of abusive verbal conduct from one man, and did not charge the other for lack of evidence.[3] Unsatisfied with the University's response and fearful of her assailants, Brzonkala left school and filed suit in federal court against the men who raped her.[4] She became one of the first women to sue[5] under the Violence Against Women Act ("VAWA" or "the Act").[6]

In *Brzonkala v. Virginia Polytechnic and State University*,[7] the case that followed, the district court concluded that the Act was unconstitutional because its provisions exceeded Congress's power under both the Commerce Clause and section 5 of the Fourteenth Amendment ("the Enforcement Provision").[8] This Note acknowledges that, in light of the Supreme Court's ruling in *United States* v. *Lopez*,[9] the *Brzonkala* court's decision was correct with respect to the Commerce Clause. The court's interpretation of the Fourteenth Amendment, however, was unnecessarily narrow.

Part I presents the historical background of VAWA. In addition, Part I reviews Congress's historical reliance on the Commerce Clause to enact civil rights legislation and concludes that if VAWA is to withstand constitutional scrutiny, the Supreme

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[1] *See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 781-82 (W.D. Va. 1996); *see also infra* notes 88-93 and accompanying text (describing circumstances of Brzonkala's rape). The procedural posture of the case required the court to assume that the factual allegations were true. Thus, for purposes of this Note, it is also assumed that Brzonkala's version of the facts is true.

[2] *See Brzonkala*, 935 F. Supp. at 782.

[3] *See id.*

[4] *See id.* at 781-82.

[5] To date, only two women have sued under section 13981, VAWA's civil rights remedy. *See id.* at 801 (holding that VAWA is unconstitutional); Doe v. Doe, 929 F. Supp. 608, 617 (D. Conn. 1996) (holding that VAWA is constitutional).

[6] *See* 42 U.S.C. § 13981 (1994) (codifying VAWA's civil rights remedy).

[7] 935 F. Supp. 779.

[8] *See id.* at 793, 801; *see also infra* notes 106-21 and accompanying text (discussing reasoning of *Brzonkala* court's holding).

[9] 514 U.S. 549 (1995).

Court's current interpretation of the Commerce Clause will require it to recognize an alternative source of constitutional authority for VAWA. Finally, Part I traces the state action requirement for the Fourteenth Amendment's Enforcement Provision. Part II discusses the *Brzonkala* decision. Part III analyzes *Brzonkala* and concludes that should *Brzonkala* reach the Supreme Court, the Court's finding that VAWA is constitutional will turn upon a more expansive interpretation of the Fourteenth Amendment's Enforcement Provision.

I. HISTORICAL BACKGROUND

A. VAWA

President Clinton signed VAWA into law on September 13, 1994.[10] Subtitle C[11] of the Act, later codified at 42 U.S.C. § 13981,[12] creates a federal civil right to be free from gender-

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[10] *See* Tracy L. Hulsey, *Violence Against Women Act*, S.C. LAWYER, Jan.-Feb. 1996, at 38.

[11] VAWA §§ 40301-40304, 108 Stat. at 1941-42 (codified at 42 U.S.C. § 13981 (1994)). This Note refers to the civil rights provision of VAWA as section 13981 or the civil rights provision.

[12] *See* VAWA of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1902 (codified in scattered sections of 8, 18, 42 U.S.C. (1994)). Subtitle A, the Safe Streets for Women Act, increases penalties for federal cases of rape and aggravated rape, creates new penalties for repeat offenders and provides grants for law enforcement and prosecution efforts directed specifically at reducing violent crimes against women. VAWA §§ 40111-40112, 40121, 40131-40133, 108 Stat. at 1903-17 (codified in scattered sections of 18 and 42 U.S.C. (1994)). Subtitle A also makes substantive changes to the Federal Rules of Evidence in rape and child molestation cases. VAWA § 40141, 108 Stat. at 1919, 2135-37 (codified at FED. R. EVID. 412-15 (1994)). Subtitle B, the Safe Homes for Women Act, authorizes federal funding for a national domestic violence hotline and requires that protective orders issued in one state be given "full faith and credit" in other states. VAWA §§ 40211-40221, 108 Stat. at 1925-31 (codified at 42 U.S.C. § 10416 (1994) and 18 U.S.C. § 2265 (1994)). Subtitle B offers financial incentives to states that institute mandatory arrest policies and increases funding for battered women shelters and family violence prevention programs. VAWA §§ 40231-40272, 108 Stat. at 1932-35 (codified in scattered sections of 42 U.S.C. (1994)). Subtitle D, Equal Justice for Women in the Courts Act, provides funding for educational programs to train state and federal judges and court personnel on issues related to sexual assault and domestic violence. VAWA §§ 40411-40422, 108 Stat. at 1942-45 (codified at 42 U.S.C. §§ 13991-14002 (1994)). Additionally, subtitle D encourages federal circuit courts to undertake gender bias studies in their courts. VAWA § 40421, 108 Stat. at 1944 (codified at 42 U.S.C. § 14001 (1994)). Subtitle E, VAWA Improvements, authorizes and provides funding for a number of national studies, including a baseline study on campus sexual assault. VAWA §§ 40501-40509, 108 Stat. at 1946-50 (codified in scattered sections of 42 U.S.C. (1994)). Subtitle F, National Stalker and Domestic Violence Reduction Act, attempts to ensure that judges issuing orders in domestic violence and stalking cases have all

motivated crimes.[13] Although *Brzonkala* is one of the first cases to address the constitutionality of VAWA's civil rights cause of action, the Act has been controversial from its inception.[14]

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available criminal history and other relevant information regarding the accused's criminal history. VAWA §§ 40601-40611, 108 Stat. at 1950-52 (codified in scattered sections of 42 U.S.C (1994)). Finally, Subtitle G, Protections for Battered Immigrant Women and Children, alters the immigration status of victims of domestic violence to give them the opportunity to leave without fear of reprisal based on immigration status. VAWA §§ 40701-40703, 108 Stat. at 1953-55 (codified in scattered sections of 8 U.S.C. (1994)). For a more comprehensive treatment of VAWA, see Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law and the United States Violence Against Women Act of 1994: The Limitations of Legislative Responses*, 5 COLUM. J. GENDER & L. 78, 124-26 (1995). Only subtitle C is within the scope of this Note.

[13] 42 U.S.C. § 13981(b) (1994).

[14] *See* W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 602-15 (1993) (discussing controversy over scope of VAWA's civil rights provision); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, YALE L.J. 2117, 2196-202 (1996) (describing civil rights remedy critics' federalism concerns). Opponents of VAWA view it as another intrusion into states' autonomy and, therefore, contrary to the principles of federalism. *See* Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After* Lopez, 96 COLUM. L. REV. 1876, 1896 (arguing that § 13981 does not displace state power because civil rights violations are traditionally addressed at federal level); Siegel, *supra*, at 2196-200. They argue that VAWA would add to overburdened federal dockets. *See* Siegel, *supra*, at 2202 (arguing that federalism concerns arise out of belief that VAWA involves federal courts in family law and criminal law but not matters of equal protection and sex discrimination). *But see* Hallock, *supra*, at 613-15 (arguing that crowding federal courts with civil rights actions is not sufficient reason to reject VAWA's civil rights remedy). United States Supreme Court Chief Justice William Rehnquist reasoned that the civil rights provision would unnecessarily involve the federal courts in domestic relations disputes. *See* WILLIAM H. REHNQUIST, CHIEF JUSTICE'S 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY, THIRD BRANCH, Jan. 1992 at 1, 3 [hereinafter CHIEF JUSTICE'S 1991 YEAR-END REPORT]; *cf.* Hallock, *supra*, at 613-15 (arguing severity of most cases rises far above "domestic relations disputes," and to characterize them as such underestimates nature and brutality of domestic violence).

Implicit in these arguments is the belief that domestic violence and sexual assault are somehow less worthy of a federal forum. *See* Siegel, *supra*, at 2201 (stating arguments asserting VAWA's interference with traditional state concerns mischaracterizes sexual assault as family matter, not rising to level of equal protection concern). Attempting to alleviate the concerns of VAWA's opponents, Senator Orrin Hatch stated:

> We're not opening the federal doors to all gender-motivated crimes. Say you have a man who believes a woman is attractive. He feels encouraged by her and he's so motivated by that encouragement that he rips her clothes off and has sex with her against her will. Now let's say you have another man who grabs a woman off some lonely road and in the process of raping her says words like, 'You're wearing a skirt! You're a woman! I hate women! I'm going to show you, you woman!' Now, the first one's terrible. But the other's much worse. If a man rapes a woman while telling her he loves her, that's a far cry from saying

The drafters of VAWA's civil rights provision carefully tailored it to address violent crimes that are discriminatory in nature.[15] VAWA defines discriminatory crimes as those in which the perpetrator's motive is based on an animus towards the victim's gender.[16] By narrowly defining the scope of section 13981, the drafters excluded random acts of violence and matters that parties have traditionally litigated in state family courts.[17] The elements of a section 13981 claim — a claim alleging a violent crime motivated by gender-based animus — reflect its drafters' intention to provide a remedy for only discriminatory crimes.[18]

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he hates her. A lust factor does not spring from animus.

Ruth Shalit, *Caught in the Act*, NEW REPUBLIC, July 12, 1993, at 12, 14 (quoting Sen. Orrin Hatch).

Opponents of the civil rights remedy also objected to Congress's reliance on the Enforcement Provision to enact section 13981 because the remedy does not require state action. *See* CHIEF JUSTICE'S 1991 YEAR END REPORT, *supra*, at 3 (opposing civil rights provision because it does not address important national interests); S. REP. NO. 103-138, at 53-54 (1993) (stating civil rights remedy is intended to apply primarily against individuals). Any individual, regardless of state affiliation, may be sued under this section. *See* 42 U.S.C. § 13981(c) (1994). In passing VAWA, however, Congress reasoned that states' failure to grant women equal protection of the laws constitutes state action. *See Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102nd Cong. 84, 104 (1991) [hereinafter *Hearing on S. 15*] (statement of Professor Cass R. Sunstein, University of Chicago School of Law) (stating that criminal justice system is failing to provide women equal protection of laws in classic sense). Thus, for purposes of VAWA, state action is presumed. *See id.* (stating that Congress has power to legislate when states fail to protect rights); *see also infra* notes 66-72 and accompanying text (presenting historical review of state action requirement for Enforcement Clause); *infra* notes 157-61 and accompanying text (arguing state action requirement is met).

[15] *See* S. REP. NO. 103-138, at 51 (describing Subtitle C as discrimination statute and not federal tort law).

[16] *See id.* at 52-53 (defining gender-motivated crimes as crimes committed because of victim's gender). VAWA defines a crime of violence as a crime "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender . . . ." 42 U.S.C. § 13981(d)(1) (1994). The Act's language does not further define "animus." *See id.* In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Court described gender animus as a "purpose that focuses upon women by reason of their sex." *Id.* at 270.

[17] *See* S. REP. NO. 103-138, at 51. The Act explicitly refuses to grant federal jurisdiction over traditional family law matters of divorce, child support, and child custody. *See id.* The narrow scope of section 13981 reflects the concerns expressed by opponents of the civil rights provision. *See supra* note 14 and accompanying text (describing opponents' arguments to VAWA's civil rights remedy).

[18] *See* Hallock, *supra* note 14, at 613-15 (explaining narrow tailoring of § 13981 to address only discriminatory crimes).

Section 13981's first element, a crime of violence, encompasses a broad range of criminal activity.[19] VAWA defines "violent crime" as a crime in which, among other things, the defendant uses, attempts to use, or threatens to use physical force against the person or property of another.[20] Although the definition of violent crime is quite broad under VAWA, the second element of a section 13981 claim limits the scope of the civil rights provision.[21]

Successful section 13981 claimants must also prove that the attacker's motivation was based on animus towards the victim's gender.[22] This element tracks the language of title VII of the 1964 Civil Rights Act.[23] Consequently, courts determine the defendant's motivation to commit the crime in VAWA cases by applying the test currently used in title VII cases.[24] Trial courts will look at the "totality of the circumstances" when determining whether the claimant has alleged and proven the second element of her claim.[25]

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[19] *See* S. REP. NO. 103-138, at 52 (defining violent crimes as crimes that are federal or state felonies against person or felonies against property that present serious risk of physical injury to another); *see also* Hallock, *supra* note 14, at 603 (stating that § 13981 covers violent conduct motivated by victim's gender).

[20] *See* 2 U.S.C. § 13981(d).

[21] *See* S. REP. NO. 103-138, at 52-53 (describing mechanics of proof for § 13981 claim).

[22] *See* 42 U.S.C. § 13981(c).

[23] *See id.* § 2000e-2(a)(1) (making it unlawful for employers to discriminate "because of" individual's race, color, religion, sex, or national origin); S. REP. NO. 103-138, at 52-53 (stating title VII case law will provide substantial guidance to trier of fact in determining presence of discrimination).

[24] *See* S. REP. NO. 103-138, at 52 (stating that § 13981 plaintiff must prove gender motivation in same manner plaintiffs in other civil rights cases prove race and sex discrimination); *see also, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993) (explaining that courts cannot determine discriminatory intent with mathematically precise test but by looking at totality of circumstances); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986) (citing EEOC Guidelines at 29 C.F.R. § 1604.11(b) (1985) and holding that courts must determine existence of sexual harassment in light of entire record and totality of circumstances); McKinney v. Dole, 765 F.2d 1129, 1131 (D.C. Cir. 1985) (stating that plaintiff may show discriminatory intent either directly or indirectly).

[25] *See* S. REP. NO. 103-138, at 52. For example, courts may consider misogynist slurs and a history of attacking members of one sex as circumstantial evidence demonstrating the requisite gender animus. *See id.* Although separately these circumstances will not demonstrate the requisite bias, when viewed together, a court may find that the victim's gender motivated the attacker to commit the crime. *See id.*

B. The Commerce Clause as Constitutional Authority for Civil Rights Legislation

Congress passed VAWA pursuant to both its power to regulate commerce among the states[26] and its power to enforce the guarantees of the Fourteenth Amendment.[27] However,

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[26] *See id.* at 54; *see also* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate commerce with foreign Nations, among several States, and with Indian Tribes); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 4-7 (1824) (interpreting Commerce Clause as granting Congress power to regulate commercial intercourse between states).

[27] *See* S. REP. NO. 103-138, at 54-55; *see also* U.S. CONST. amend. XIV, § 5 (granting Congress power to enforce Fourteenth Amendment by appropriate legislation). Congress passed VAWA under the constitutional authority granted by section 5 to enforce the protection of section 1 against denying "the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see also* S. REP. NO. 103-138, at 54-55.

Congress explained two ways in which victims of gender-based crime are denied equal protection of the laws. *See id.* at 48-50. First, bias crimes are not adequately remedied by either the state or federal justice systems. *See id.* at 48-49. For example, women are protected from gender-based discrimination only if it occurs in the workplace. *See* 42 U.S.C. § 2000(e) (1994) (making employment discrimination on basis of sex unlawful); *see also Hearing on S. 15, supra* note 14, at 86-87 (noting title VII of 1964 Civil Rights Act does not provide civil rights remedy for gender crimes committed on street or in home); Hallock, *supra* note 14, at 594 (stating title VII is ineffectual remedy for violent gender discrimination because most violent crimes against women are not perpetrated in workplace). Civil rights legislation enacted to protect racial minorities is also insufficient protection against gender-based crimes. *See* 42 U.S.C. § 1985(3) (1994) (protecting individuals from conspiracies to deprive individuals of equal protection of laws); S. REP. NO. 102-197, at 44 (1991) (noting most women suffer assault at hands of only one male and, therefore, requisite conspiracy is lacking in majority of gender-based crime).

Second, Congress determined that discrimination in state criminal justice systems also deprives female victims of gender-based crime equal protection of the law. *See* S. REP. NO. 103-138, at 49 (noting number of formal and informal barriers to women in state criminal justice systems); WOMEN AND VIOLENCE: HEARINGS ON LEGISLATION TO REDUCE THE GROWING PROBLEM OF VIOLENT CRIME AGAINST WOMEN BEFORE THE SENATE COMMITTEE ON THE JUDICIARY (PART I), 101st Cong. 4 (1990) (stating women frequently face climate of condescension, indifference, and hostility in state criminal justice systems); DIANA E.H. RUSSEL, RAPE IN MARRIAGE 21-23 (1982) (stating domestic violence has long been treated as family matter not worthy of law enforcement's attention and resources); Hallock, *supra* note 14, at 595-98 (discussing states' requirement of evidence of force to prosecute marital rape); *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 17 (1986) (describing task force findings of courts' daily distortion of substantive law based on cultural stereotypes of women's role in marriage and society); Lynn Hecht Shafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 28 (stating recent studies indicate informal discrimination in form of gender bias in courts is pervasive); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991) (documenting legal system's hostility towards sexual assault and domestic violence claims); *Prosecution Seen as Unlikely in 228 Rape Cases in Oakland*, N.Y. TIMES, Nov. 13, 1990, at B10 (reporting police in Oakland, California, classified one of every four claims of rape as "unfounded," although subsequent

legislative history reveals that Congress relied primarily on the Commerce Clause when it enacted VAWA.[28] VAWA was enacted before the Supreme Court's decision in *Lopez*.[29] Thus, Congress was acting under the Court's earlier expansive interpretation of the Commerce Clause when it passed VAWA.[30]

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investigation proved many such-classified rapes did in fact occur).

[28] *See* S. REP. NO. 103-138, at 54-55 (stating Commerce Clause undoubtedly grants Congress power to create VAWA's civil rights remedy). Following testimony from health professionals, victims of domestic violence, and state attorneys general, Congress concluded that violence against women significantly affects interstate commerce. *See id.; see also infra* notes 132-39 and accompanying text (analyzing importance of congressional findings in Court's determination of Congress's power under Commerce Clause). Congress found that nearly half of the nation's rape victims lose their jobs or are forced to quit in the aftermath of the crime. *See* S. REP. NO. 103-138 at 54-55; *see also* Elizabeth M. Ellis et al., *An Assessment of Long-Term Reaction to Rape*, 90 J. ABNORMAL PSYCHOL. 263 (1981) (describing study which concluded nearly 50% of nation's rape victims lose or are forced to quit their jobs due to crime's severity). Therefore, gender-based violence, which most often targets women, prevents women from fully participating in the national economy. *See* S. Rep. No. 103-138, at 54-55. Congress also found that victims of sexual assault and domestic violence incur substantial health costs that adversely affect interstate commerce. *See id.*

Congress relied on the Supreme Court's decision in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), to determine which actions affect interstate commerce. In *Heart of Atlanta*, the Supreme Court held that Congress may prohibit discrimination in hotels and restaurants under the Commerce Clause. *See id.* at 258. Congress determined that gender-based violence is similar to the discrimination at issue in *Heart of Atlanta*. *See* S. REP. NO. 103-138 at 54-55 (stating Congress used same justifications for Commerce Clause power in 1964 Civil Rights Act as in VAWA). Similar to the Court's decision in *Heart of Atlanta*, Congress reasoned that gender-based violence affects the economy because women who fear such violence are less likely to take jobs in certain areas or at certain hours. *See id.* at 54. Congress sought to make the nexus between interstate commerce and the VAWA explicit: gender-based violence restricts women's movement among the states. *See id.* at 54-55.

[29] *Compare* 103 Stat. 1902 (1994) (enacting VAWA in 1994), *with* United States v. Lopez, 115 S. Ct. 1624 (1995) (decided in 1995).

[30] *See* S. REP. NO. 103-138, at 54 (describing Commerce Clause as granting Congress broad power to regulate conduct that has even slightest effect on interstate commerce); *Hearing on S. 15*, *supra* note 14, at 88 (quoting Professor Burt Neuborne, New York University School of Law) (stating that Commerce Clause grants Congress clear authority to create civil rights remedy and Fourteenth Amendment sources are "simply backstops"). Until *Lopez* the Supreme Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), had represented the modern conception of Congress's power under the Commerce Clause. *See* Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause*, 44 U. KAN. L. REV. 217, 220-25 (1996) (providing brief historical overview of Commerce Clause case law and describing *Wickard* as modern interpretation of Commerce Clause); *see also infra* notes 38-47 and accompanying text (explaining *Wickard* Court's expansive interpretation of Congress's power under Commerce Clause).

1. Civil Rights Legislation and Commerce Clause Jurisprudence Before *Lopez*

In the aftermath of the Civil War, the Reconstruction Congress passed the Fourteenth Amendment to ensure all citizens equal protection of the laws.[31] Section 5 permits Congress to enact all necessary and appropriate legislation to ensure the guarantees of the Fourteenth Amendment.[32] The Reconstruction Congress believed that section 5 empowered the federal government to pass the Civil Rights Act of 1875, which prohibited and punished racial discrimination in places of public accommodation and recreation.[33]

Eight years after Congress enacted the Civil Rights Act, however, the Supreme Court, in the *Civil Rights Cases*,[34] found the Civil Rights Act of 1875 unconstitutional.[35] The Court held that section 5 of the Fourteenth Amendment does not grant Congress the power to enact laws that forbid private individuals from denying other citizens their civil liberties.[36] The Supreme Court's narrow interpretation of the Enforcement Provision in the *Civil Rights Cases* left Congress seemingly powerless to protect newly freed slaves from private acts of discrimination.[37] The Court's decision in *Wickard v. Filburn*,[38] however, provided Con-

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[31] *See* CONG. GLOBE, 42d Cong., 1st Sess. 153 (1871) (statement of Rep. Garfield) (stating that § 5 empowers Congress to act when state laws are equal on their face, but states systematically deny equal protection under them); JOHN HOPE, RECONSTRUCTION AFTER THE CIVIL WAR 51-64 (1994) (detailing organized violence by private citizens against Blacks in South resulting in little or no action from local authorities); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1147-48 (arguing legislative history does not support Supreme Court's conclusion that Fourteenth Amendment was not meant to apply to actions of private individuals).

[32] *See* U.S. CONST. amend. XIV, § 5.

[33] *See* FREDERICK P. LEWIS, THE DILEMMA IN THE CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AMENDMENT 7 (1980) (discussing legislative history of Fourteenth Amendment).

[34] 109 U.S. 3 (1883).

[35] *See id.* at 3, 11, 24-26.

[36] *See id.* at 11; *see also Ex Parte* Virginia, 100 U.S. 339, 347 (1879) (holding § 5 permits Congress to reach judicial conduct); United States v. Cruikshank, 92 U.S. 542, 554 (1876) (stating that Fourteenth Amendment adds nothing to rights of one citizen against another).

[37] *See* LEWIS, *supra* note 33, at 12-13 (describing period of dormancy in use of federal power to protect civil rights after *Civil Rights Cases*).

[38] 317 U.S. 111 (1942).

gress with an alternative means of protecting civil liberties through the Commerce Clause.[39]

In *Wickard*, the Court upheld the federal regulation of production and consumption of homegrown wheat.[40] Filburn challenged the regulation, arguing that consumption of his own wheat did not constitute interstate commerce.[41] The Court rejected his argument and found that the cumulative effect of Filburn's activities had a substantial impact on interstate commerce.[42]

Pursuant to its Commerce Clause power as defined in *Wickard*, Congress could regulate activities which, when viewed in the aggregate, substantially affected interstate commerce.[43] Congress has used,[44] and the Supreme Court has affirmed,[45] the Commerce Clause as constitutional authority to enact civil rights legislation.[46] Thus, the Court's broad interpretation of congres-

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[39] *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000e (1994) (citing Commerce Clause as constitutional authority for civil liberties legislation); Katzenbach v. McClung, 379 U.S. 294, 301-05 (1964) (holding Congress may prohibit discrimination in restaurants pursuant to Commerce Clause); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding Commerce Clause empowers Congress to prohibit discrimination in public accommodations).

[40] *See Wickard*, 317 U.S. at 128-29.

[41] *See id.* at 119.

[42] *See id.* at 127-28.

[43] *See* McAllister, *supra* note 30, at 224-25 (describing *Wickard* as illustrating Commerce Clause power at its zenith). Congress has used *Wickard*'s expansive interpretation of the Commerce Clause to justify legislation addressing commercial activities as well as social problems. *See, e.g.*, Fry v. United States, 421 U.S. 542, 547-48 (1975) (citing *Wickard* and holding Congress may use Commerce Clause power to institute wage and salary controls for purely intrastate employees); Perez v. United States, 402 U.S. 146, 151, 156-57 (1971) (citing *Wickard* and holding Congress may use Commerce Clause power to regulate loan sharks because they are in class largely controlled by organized crime); *McClung*, 379 U.S. at 301-05 (citing *Wickard* and holding Congress may use Commerce Clause power to prohibit discrimination in restaurants); *Heart of Atlanta Motel*, 379 U.S. at 257-58 (citing *Wickard* and holding Congress may use Commerce Clause power to prohibit discrimination in public accommodations); Doe v. Doe, 929 F. Supp. 608, 614, 617 (D. Conn. 1996) (citing *Wickard* and holding Congress may use Commerce Clause power to provide remedy for gender-based violence).

[44] *See* 42 U.S.C. §§ 2000a-2000e.

[45] *See McClung*, 379 U.S. at 299 (holding that Commerce Clause authorizes Congress to enact federal legislation forbidding discrimination in restaurants); *Heart of Atlanta Motel*, 379 U.S. at 258 (holding that federal legislation forbidding discrimination in public accommodations is authorized by Commerce Clause).

[46] *See* S. REP. NO. 88-872, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2366-67 (stating Commerce Clause may be used to prohibit racial discrimination if it has effect,

sional power under the Commerce Clause supplied Congress with the necessary constitutional authority to protect civil liberties.[47] In 1995, however, the Supreme Court recharacterized and narrowed the scope of Congress's power under the Commerce Clause in *Lopez*.

2. Civil Rights Legislation After *Lopez*

In *Lopez*, the Court reviewed Congress's power to enact the Gun-Free Schools Act,[48] which criminalized possession of a firearm in a school zone.[49] Lopez was charged with violating the statute when he arrived at his San Antonio high school carrying a .38 caliber handgun.[50] After a bench trial, the district court found him guilty and sentenced him to six months imprisonment and two years supervised release.[51] Finding that the statute's provisions exceeded Congress's power to regulate commerce, the United States Court of Appeals for the Fifth Circuit reversed Lopez's conviction.[52]

Affirming the Fifth Circuit's ruling, the Supreme Court revised the framework for Commerce Clause analyses.[53] The Court identified three broad categories of activity that Congress may regulate under the Commerce Clause: channels of interstate commerce, instrumentalities of interstate commerce, and activities that have a substantial relation to interstate commerce.[54]

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either individually or cumulatively, upon commerce); *see also supra* note 28 and accompanying text (describing Congress's reliance on *Wickard*'s interpretation of Commerce Clause in enacting VAWA).

[47] *See* Anna Kampourakis & Robin C. Tarr, *About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of* Lopez, 11 ST. JOHN'S J. LEGAL COMMENT. 191, 193-94 (1995) (describing Commerce Clause as essential tool to preserve individual liberties).

[48] Pub. L. No. 103-382, 108 Stat. 3907 (1994) (codified in scattered sections of U.S.C.).

[49] *See* 18 U.S.C. § 922(q)(1) (1994).

[50] *See Lopez*, 514 U.S. at 551.

[51] *See id.* at 552.

[52] *See id.*

[53] *See id.* at 558-59.

[54] *See id.* at 558. The government argued that possession of a firearm in a school zone affected interstate commerce in two ways. *See id.* at 563-64. First, firearms in schools would result in violent crime, which would increase the cost of insurance and reduce individuals' willingness to travel to areas perceived as unsafe. *See id.* Second, violent crime would threaten the educational process, resulting in a less productive citizenry. *See id.* A less productive citizenry would have an adverse affect on interstate commerce. *See id.* The Court rejected

The Court quickly dismissed the application of the first two categories to *Lopez* and concluded that the Gun-Free Schools Act must substantially affect interstate commerce to withstand constitutional scrutiny.[55] It held that Congress must satisfy a nexus requirement by showing a connection between the activities it seeks to regulate and interstate commerce.[56] The Court rejected the economic costs of crime, a substantial threat to the educational process, and individuals' decreased willingness to engage in interstate travel as providing a nexus between the Gun-Free Schools Act and interstate commerce.[57] If such attentuated connections satisfied the nexus requirement, the Court reasoned, the Commerce Clause would impermissibly grant the federal government general police powers under the guise of the Commerce Clause.[58]

Lopez is a marked change in Commerce Clause jurisprudence.[59] The significance of *Lopez*, however, is unclear.[60] While

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these arguments because they lacked a logical limit on federal power. *See id.* at 564-67.

The Court suggested that a jurisdictional element, requiring a nexus between the guns in schools and interstate commerce, may limit federal power. *See id.* at 561. The Gun-Free Schools Act possessed no such element. *See id. But see id.* at 618-19 (Breyer, J., dissenting) (arguing that magnitude of effect on interstate commerce provides nexus between Act and interstate commerce).

[55] *See id.* at 559.

[56] *See id.* at 562-63; *see also* United States v. Bass, 404 U.S. 336, 350-51 (1971) (holding that there must be demonstrated nexus between act and interstate commerce for statute to be constitutional).

[57] *See Lopez*, 514 U.S. at 1631.

[58] *See id.* at 567.

[59] *See* McAllister, *supra* note 30, at 220-25 (detailing history of Commerce Clause jurisprudence and stating true impact of *Lopez* is philosophical not practical); *see also supra* notes 45-55 and accompanying text (summarizing Commerce Clause power prior to *Lopez*).

[60] *See* McAllister, *supra* note 30, at 219 (stating that *Lopez* did not work "any revolutionary curtailment of congressional power"); David O. Stewart, *Back to the Commerce Clause: The Supreme Court Has Yet to Reveal the True Significance of* Lopez, A.B.A. J., July 1995, at 46, 48 (suggesting that Commerce Clause revolution was over as quickly as it began); Stuart Taylor, Jr., *Judging with Pinpoint Accuracy: The Supreme Court's Decision that Congress Couldn't Ban Guns in Schools Was Ill-Timed in Light of the Oklahoma City Tragedy, but the Court's Reading of the Commerce Clause Seems Correct*, THE RECORDER, May 8, 1995, at 10 (quoting Laurence Tribe and stating that importance of *Lopez* is greatly exaggerated). *See* Moore v. United States, 25 F.3d 1042 (4th Cir. 1994) (upholding conviction under federal arson statute and finding interstate commerce connection in fact that house was connected to interstate gas and telephone lines), *cert. denied*, 514 U.S. 1102 (1995); United States v. Ramey, 24 F.3d 602, 607-09 (4th Cir. 1994) (upholding conviction under federal arson statute and finding interstate commerce connection in fact that house received electricity through interstate power grid), *cert. denied*, 514 U.S. 1103 (1995).

most legislation will remain unaffected,[61] the Court's interpretation of the Commerce Clause in *Lopez* sends an unmistakable message to Congress: the Court will adhere to principles of federalism and examine congressional attempts to encroach on traditional state functions with a heightened level of scrutiny.[62] Thus, civil rights legislation enacted pursuant to the Commerce Clause now faces an uncertain future.[63] As *Brzonkala*'s interpretation of *Lopez* demonstrates, Congress must rely on another constitutional source of authority to enact civil rights legislation; specifically, that found in the Fourteenth Amendment.[64]

C. The Scope of Congressional Power Under the Enforcement Provision of the Fourteenth Amendment

The Fourteenth Amendment guarantees that no state shall make or enforce any law depriving any person of the "equal protection of the laws" (section 1) and empowers Congress to enforce that guarantee with appropriate legislation (section 5).[65] Because the Fourteenth Amendment only regulates state action,[66] some form of state involvement is required before

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[61] *See* McAllister, *supra* note 30, at 220 (stating that most legislation enacted under Commerce Clause regulates channels or instrumentalities of commerce and, therefore, is not subject to *Lopez*'s stringent third category analysis).

[62] *See id.* at 220 (stating that Supreme Court has reminded Congress that Court will seriously consider federalism principles when reviewing legislation enacted pursuant to Commerce Clause).

[63] *See* Kampourakis & Tarr, *supra* note 47, at 194 (stating Freedom of Access to Clinic Entrances Act may be unconstitutional exercise of Commerce Clause power in light of *Lopez*). *But see Lopez*, 514 U.S. 559-60 (citing with approval *Heart of Atlanta* and *McClung*); Maloney, *supra* note 14, at 1939 (arguing VAWA is constitutional under Commerce Clause despite *Lopez*); Amy H. Nemko, *Saving Face: Clinic Access Under a New Commerce Clause*, 106 YALE L.J. 525, 526 (1996) (arguing Freedom of Access to Clinic Entrances Act is constitutional despite *Lopez*).

[64] *See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 793 (W.D. Va. 1996) (holding VAWA unconstitutional under Commerce Clause); *see also* Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE L. REV. 429, 463 (1996) (arguing Court could more easily distinguish *Lopez* from cases challenging civil rights legislation if it had relied on Thirteenth or Fourteenth Amendment in upholding 1964 Civil Rights Act); Julian Epstein, *Evolving Spheres of Federalism After* U.S. v. Lopez *and Other Cases*, 34 HARV. J. ON LEGIS. 525, 526, 552 (noting that *Lopez* places certain policy areas beyond Congress's Commerce Clause power and suggesting § 5 as alternative source of federal law making power).

[65] *See* U.S. CONST. amend. XIV.

[66] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (stating that state action requirement preserves area of individual freedom by limiting reach of federal law). It is

Congress may act under section 5.[67] The extent of state involvement that the Enforcement Provision requires, however, is unclear.[68] Congress may prohibit actions pursuant to section 5 despite the Court's determination that those actions do not violate section 1 of the Fourteenth Amendment.[69] Congress's

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well settled that the Equal Protection Clause applies only to state action. *See id.* While some examples of state action are obvious, *see, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (assuming presence of state action and holding that race-based exclusions from jury violates Equal Protection Clause), the Court has also found state action where private actors are at least partially responsible for the complained of conduct, *see, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 84-86 (1972) (finding state action where creditor attempted to enforce private contract and judicially attach property); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (finding state action where state permitted individual to recover damages for libel); Shelley v. Kraemer, 334 U.S. 1, 10-11 (1948) (finding state action where state enforced privately created racially restrictive covenants). *But see* Flagg Bros. v. Brooks, 436 U.S. 149, 163-64 (1978) (holding that creditor's use of self-help remedies pursuant to state statute does not constitute state action); Hudgens v. NLRB, 424 U.S. 507, 518-19 (1976) (failing to find state action where private property owner invoked state trespass laws to exclude protesters from private shopping center); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974) (holding that public utility's termination of service without notice and hearing is not state action).

[67] *See Civil Rights Cases*, 109 U.S. 3, 11, 23-24 (1883); *see also Brzonkala*, 935 F. Supp. at 796 (stating conduct that denies equal protection of laws must be attributable in some way to state).

[68] *See* Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966) (reasoning that Congress need not constrain legislation to acts prohibited under § 1; rather, Congress may prohibit acts subsequent to judiciary's determination that they are constitutional under § 1); Archibald Cox, *The Supreme Court 1965 Term Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 102 (1966) (stating *Morgan* implies Congress may regulate private activities as means of implementing prohibition against state).

[69] *See Morgan*, 384 U.S. at 648-49 (holding that Congress may prohibit enforcement of state law requiring English literacy to vote even though Supreme Court had sustained similar law in face of equal protection challenge). The Enforcement Provision grants Congress the authority to legislate against what it deems to be a violation of equal protection. *See id.* at 653 (stating that Court need only perceive basis for Congress's determination of equal protection violation).

In the recently decided case *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Supreme Court further refined its section 5 jurisprudence. At issue in *Flores* was the Religious Freedom and Restorative Act ("REFRA"), 42 U.S.C. § 2000bb(a), which Congress enacted to ensure that governments do not substantially burden religious exercise without a compelling justification. *See Flores*, 117 S. Ct. at 2162. Congress enacted REFRA in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See Flores*, 117 S. Ct. at 2160. In *Smith*, the Court held that government need not demonstrate a compelling interest in order to apply neutral, generally applicable laws to religious practices. *See Smith*, 494 U.S. at 885.

Attempting to reverse the Court's holding in *Smith*, and reestablish the compelling interest standard, Congress enacted REFRA under section 5 of the Fourteenth

power to enforce the guarantees of the Fourteenth Amendment under section 5 is therefore broader than the Court's power under section 1.[70] The Fourteenth Amendment augments Congress's power, not the Court's, to insure that individuals are able to exercise their right to equal treatment by government when government fails to act.[71] Thus, a lesser showing of state action than that required for the Court to act under section 1 may enable Congress to act under section 5.[72]

In *Katzenbach* v. *Morgan*,[73] the Supreme Court articulated the parameters of Congress's authority under the Enforcement Provision.[74] At issue in *Morgan* was section 4(e) of the Voting Rights Act of 1965,[75] which prohibited states from denying citizens the right to vote on grounds of English literacy.[76]

Amendment. *See* 42 U.S.C. § 2000bb(a). The Court, in *Flores*, held that REFRA was an unconstitutional exercise of Congress's power to enforce the Fourteenth Amendment. In so holding, the Court reasoned that Congress may not alter the meaning of the Constitution. REFRA, the Court determined, impermissibly expanded the guarantees of the Fourteenth Amendment. Thus, *Flores* confirms Congress's remedial power under the Enforcement Provision and the courts' authority to review the scope of that power. *See Flores*, 117 S. Ct. 2157.

Flores does not say, however, that the Court must first determine that an interim violates section 1 of the amendment before Congress may legislate under section 5. On the contrary, the Court explicitly approved *Morgan* and noted that the Voting Rights Act was justified in light of the record of discrimination before Congress. *See Flores*, 117 S. Ct. 2167-69. Similarly, Congress enacted VAWA only after extensive review and documentation of the discrimination women suffer at the hands of gender-based violence. *See supra* notes 26-28 and accompanying text (recounting congressional findings on VAWA).

[70] *See Morgan*, 384 U.S. at 648-49 (1966) (holding that Congress may prohibit actions which, in and of themselves, do not violate equal protection clause). *But see Flores*, 117 S. Ct. at *2168* (holding that *Morgan* should not be read as holding that Congress may expand Fourteenth Amendment's guarantees). *See generally* R.J. HARRIS, THE QUEST FOR EQUALITY 33-56 (1960) (stating legislative history indicates Reconstruction Congress believed § 5 allowed Congress to reach private individuals); J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 187-217 (1951); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L. J. 1353, 1356-57 (1964) (stating that framers and backers of Fourteenth Amendment believed that amendment empowered them to protect freed slaves from private aggression).

[71] *See* Laurence H. Tribe, Commentary, *The Constitutionality of the Freedom of Access to Clinic Entrances Act of 1993*, 1 VA. J. SOC. POL'Y & L. 291 (1994).

[72] *See* Cox, *supra* note 69, at 102 (arguing that after *Morgan* Congress may regulate private behavior under § 5 as means of securing state's performance of its Fourteenth Amendment duties); *See* Tribe, *supra* note 72, at 296-97 (suggesting *Morgan* decision can be interpreted as allowing Congress to regulate private conduct under § 5).

[73] 384 U.S. 641 (1966).

[74] *See id.* at 650.

[75] *See* 42 U.S.C. § 1973b(e) (1994).

[76] *See id.* Specifically, section 4(e) prohibited laws denying the right to vote on grounds

Congress passed the Voting Rights Act pursuant to the Enforcement Provision of the Fourteenth Amendment[77] and in reaction to the Court's decision in *Lassiter* v. *Northampton County Board of Election*.[78] In *Lassiter*, the Court held that states may deny English illiterate citizens the right to vote without violating section 1 of the Fourteenth Amendment.[79]

The Plaintiffs in *Katzenbach* challenged the constitutionality of section 4(e).[80] New York's Attorney General argued that Congress could only enact section 4(e) pursuant to the Enforcement Provision if the Court determined that New York's literacy requirement violated the Equal Protection Clause itself.[81] The Court rejected this argument and held that Congress's power under section 5 was independent and distinct from the Court's power under section 1 of the Fourteenth Amendment.[82]

The *Katzenbach* court held that section 5 contains the equivalent of "the necessary and proper power."[83] In other words, the Court determined that section 5 grants Congress the power to do what it reasonably believes necessary and proper to ensure equal protection of the laws.[84] Thus, pursuant to section 5, Congress may secure federal rights through legislation.[85] Congress may determine which situations threaten principles of equality and adopt remedial measures accordingly.[86] *Brzonkala* is

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of English literacy to those persons who complete the sixth grade in public school, or an accredited private school, in which the language of instruction was other than English. *See id.*

[77] *See Morgan*, 384 U.S. at 648-49.

[78] 360 U.S. 45, 52-53 (1959).

[79] *See id.* at 52-53.

[80] *See Morgan*, 384 U.S. at 643. New York's election laws required English literacy as a condition of voting. *See id.* at 644-45. Plaintiffs sought to prevent several hundred thousand non-English-speaking New York citizens, recent migrants from the Commonwealth of Puerto Rico, from voting. *See id.*

[81] *See id.* at 648.

[82] *See id.* at 648-51.

[83] *See id.* at 650-51. The necessary and proper power was first articulated in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

[84] *See Morgan*, 384 U.S. at 650-51.

[85] *See id.*; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (stating § 5 permits Congress to identify and redress effects of society-wide discrimination); *see also* Tribe, *supra* note 73, at 295-98 (discussing Congress's authority under § 5).

[86] *See Morgan*, 384 U.S. at 650-51 (describing § 5 as positive grant of legislative power to

the first case since *Lopez* to consider whether Congress's power to secure federal rights includes the power to regulate private actors in the face of state inaction.[87]

II. THE BRZONKALA DECISION

A. Alleged Facts and Procedural Posture

On September 21, 1994, Christy Brzonkala, Antonio Morrison, and James Crawford were in a Virginia Polytechnic Institute ("VPI") dormitory room.[88] Brzonkala alleged that after she twice refused to have intercourse with Morrison, Morrison pushed her down onto the bed and raped her.[89] He tore off her clothes, pinned down her arms, pressed his knees against her legs, and forced her to submit to intercourse.[90] Brzonkala tried, unsuccessfully, to push him off.[91] After Morrison finished, but before Brzonkala could recover from the assault, Crawford raped her.[92] Morrison then exchanged places with Crawford and raped Brzonkala a second time.[93]

Brzonkala had met Morrison and Crawford only a half-hour before the assault occurred.[94] She knew only their first names and that they were football players on the VPI team.[95] Five months later, Brzonkala recognized Morrison and Crawford as the two men who sexually assaulted her.[96] Brzonkala then filed

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determine whether and what legislation is necessary to secure equal protection of laws); *Flores*, 117 S. Ct. at *2168* (affirming *Morgan*'s definition of § 5 power, but disagreeing with interpretation that *Morgan* permits Congress to define and enlarge Fourteenth Amendment's guarantees).

[87] *See* S. REP. NO. 103-138, at 55 (1993) (relying on Enforcement Provision to enact VAWA); *see also* Part III.B (arguing Congress may regulate private actors who deprive individuals of equal protection of laws when state fails to act).

[88] *See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 781-82 (W.D. Va. 1996). From the facts of the case, it appears that Brzonkala did not dispute that she consumed alcohol earlier that evening. *See id.* After the attack, another student overheard Morrison announce that he liked "to get girls drunk and fuck the shit out of them." *See id.* at 782.

[89] *See id.*

[90] *See id.*

[91] *See id.*

[92] *See id.*

[93] *See id.* Neither Crawford nor Morrison used a condom. *See id.* Before leaving, Morrison said to Brzonkala, "You better not have any fucking diseases." *Id.*

[94] *See id.*

[95] *See id.*

[96] *See id.* It is unclear from the facts of the case why Brzonkala was not able to identify

a complaint against Morrison and Crawford with VPI's judicial committee.[97]

Morrison admitted to campus authorities that he had sexual contact with Brzonkala.[98] Crawford denied any personal involvement but confirmed that Morrison had sexual contact with Brzonkala.[99] The VPI judicial committee found Morrison guilty of sexual assault and suspended him from VPI for two semesters.[100] Despite two unsuccessful appeals from the committee's ruling,[101] Morrison succeeded in convincing VPI to set aside the suspension in exchange for a plea of guilty to using abusive language.[102] The judicial committee found insufficient evidence to proceed against Crawford.[103] Fearing for her safety in light of Morrison's planned attendance during the 1995 fall semester, Brzonkala decided not to return to VPI.[104] Instead, she filed suit under VAWA in federal court.[105]

B. The District Court's Holding

Alleging that Crawford and Morrison violated her civil rights under VAWA, Brzonkala filed a complaint against them[106] in the United States District Court for the Western District of Virginia.[107] Crawford and Morrison moved to dismiss the

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her assailants until five months after the attack. *See id.* at 781-82.

[97] *See id.* Brzonkala filed her complaint under VPI's Sexual Assault Policy. *See id.* at 782.

[98] *See id.*

[99] *See id.*

[100] *See id.*

[101] *See id.* On the second appeal, the committee found Morrison guilty of the lesser offense of "abusive conduct," but reimposed the two year suspension. *See id.*

[102] *See id.* Morrison appealed the second finding of "abusive conduct" and the two year suspension. *See id.*

[103] *See id.*

[104] *See id.* After filing, Brzonkala learned that an unidentified male VPI athlete advised Crawford that he should have "killed the bitch." *See id.*

[105] *See id.* at 781. Brzonkala filed a complaint with local law enforcement, but a grand jury failed to indict Morrison and Crawford due to insufficient evidence. *See* Randy King, *Tony Morrison Won't Play for Hokies Off-the-Field: Problems Overshadowed Career of Tech Linebacker*, ROANOKE TIMES & WORLD NEWS, Mar. 25, 1997, at B1.

[106] *See Brzonkala*, 935 F. Supp. at 781. In addition to Morrison and Crawford, Brzonkala originally filed complaints against VPI, William Landslide in his capacity as Comptroller of the Commonwealth, and VPI football player Cornell Brown. *See id.* The court dismissed these claims. *See id.*

[107] *See id.* Brzonkala also alleged violations of title IX of the Education Amendment Act, 20 U.S.C. § 1681 (1994), and of various state laws. *See Brzonkala*, 935 F. Supp. at 781. The

complaint on two grounds.[108] First, they argued that Brzonkala had failed to state a claim upon which relief could be granted.[109] Second, the defendants argued that VAWA was unconstitutional.[110] The district court found that Brzonkala had alleged facts sufficient to support an inference of "gender animus."[111] On the issue of VAWA's constitutionality, however, the court found in favor of the defendants.[112]

Relying on *Lopez*, the district court concluded that VAWA was not a constitutional exercise of Congress's power to regulate interstate commerce.[113] Comparing VAWA with the Gun-Free Schools Act at issue in *Lopez*, the court found no significant differences.[114] Neither statute regulated activities economic in nature, and both statutes lacked a jurisdictional nexus.[115] The *Brzonkala* court found that gender-based violence, like possession of a gun near a school, has no substantial effect on interstate commerce.[116] The court concluded, therefore, that gender-based violence is not within Congress's power to regulate under the Commerce Clause.[117]

The *Brzonkala* court further found that Congress acted beyond its Fourteenth Amendment powers in enacting VAWA.[118] The court acknowledged that the Fourteenth Amendment's legislative history suggests that its framers intended to regulate private behavior.[119] Relying on the *Civil*

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court dismissed the title IX claim prior to this decision and remanded the state law claims to state court without prejudice. *See id.*

[108] *See id.* at 783.

[109] *See id.*

[110] *See id.*

[111] *See id.* at 784-85. Particularly with respect to Morrison, the Court found that the rapes were motivated by an animus based on Brzonkala's gender. *See id.* at 785. Based on the nature of gang rape as opposed to one-on-one rape, Morrison's comment to Brzonkala after the rape, and Morrison's history of having intercourse with inebriated women, the court inferred gender animus. *See id.* The court did not discuss or decide whether the claim against Crawford was sufficient to withstand the motion to dismiss. *See id.* at 785.

[112] *See id.* at 801.

[113] *See Brzonkala*, 935 F. Supp. at 793.

[114] *See id.* at 788-93.

[115] *See id.* at 791-93; *see also infra* notes 127-48 and accompanying text (arguing VAWA lacks jurisdictional nexus).

[116] *See Brzonkala*, 935 F. Supp. at 791.

[117] *See id.* at 793.

[118] *See id.* at 801.

[119] *See id.*; *see also* LEWIS, *supra* note 33, at 4 (discussing legislative history of Recon-

Rights Cases, however, the court disregarded the Amendment's legislative history and found that the Enforcement Provision requires some state involvement.[120] Because VAWA did not regulate state behavior, the *Brzonkala* court concluded that VAWA was an unconstitutional exercise of congressional power under the Fourteenth Amendment's Enforcement Provision.[121]

III. ANALYSIS

The *Brzonkala* court is the first court to find VAWA unconstitutional.[122] *Lopez*'s limited reading of the Commerce Clause seems to place gender-based violence beyond Congress's Commerce Clause power.[123] Therefore, if Congress wishes to provide a federal remedy for gender-based violence with VAWA, it must rely on another source of constitutional authority.[124] The Fourteenth Amendment's Enforcement Provision provides Congress with a constitutional alternative to the Commerce Clause.[125]

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struction legislation); Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 584-85 (1985) (stating that framers of Fourteenth Amendment were concerned with private encroachment on civil rights); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329-30 (1952) (explaining that it was unreasonable to limit scope of Amendment to state action since most civil rights violations were product of individual action). The *Brzonkala* court also cited *United States v. Guest*, 383 U.S. 745, 755 (1966), which suggested that, but did not decide whether, Congress had the power to reach private behavior under section 5 of the Fourteenth Amendment. *Brzonkala*, 935 F. Supp. at 800-01; *see also supra* notes 27-28 and accompanying text (discussing Congress's intent in enacting § 5).

[120] *See Brzonkala*, 935 F. Supp. at 794.

[121] *See id.* at 801. The Government has appealed the case on Brzonkala's behalf to the Court of Appeals for the Fourth Circuit. *See For the Record*, ROANOKE TIMES & WORLD NEWS, Mar. 27, 1997, at A2.

[122] *See* Maloney, *supra* note 14, at 1877 (stating that only two women have sued under VAWA and citing *Brzonkala* as case that declared VAWA unconstitutional under Commerce Clause).

[123] *See Brzonkala*, 935 F. Supp. at 793; *see also* United States v. Lopez, 514 U.S. 549 (1995) (restricting Commerce Clause power); *infra* Part III.A (arguing VAWA is unconstitutional under Commerce Clause).

[124] *See* S. REP. NO. 103-138, at 55 (1993) (basing Congress's authority to enact VAWA on Fourteenth Amendment).

[125] *See id.*; *Hearing on S. 15*, *supra* note 14, at 84-131 (quoting Professor Cass R. Sunstein, University of Chicago School of Law, and Professor Burt Neuborne, University of New York School of Law) (stating that Congress may enact VAWA pursuant to power to enforce Fourteenth Amendment).

A. VAWA in Light of Lopez*: No Jurisdictional Nexus*

Lopez limits congressional power under the Commerce Clause.[126] However, of the three categories of activity that Congress may regulate under the Commerce Clause, *Lopez* is likely to affect only one: activities which have a substantial effect on interstate commerce.[127] An activity has a substantial effect on interstate commerce if there is a demonstrable connection, "a jurisdictional nexus,"[128] between the regulated activity and interstate commerce.[129] Without this nexus, such legislation is unconstitutional under the *Lopez* standard. Both the Gun-Free Schools Act at issue in *Lopez* and VAWA fall in this category of regulation.[130] The *Brzonkala* court concluded that VAWA, like the Gun-Free Schools Act, lacks a jurisdictional nexus between gender-based violence and interstate commerce.[131]

Congress went to great lengths to provide the judiciary with findings on the effect of gender-based violence on interstate commerce.[132] First, Congress found that women are unlikely to travel in interstate commerce out of fear of being attacked.[133] Second, Congress acknowledged that fifty percent of rape victims become unemployed after being raped.[134] Finally, Congress rec-

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[126] *See* McAllister, *supra* note 30, at 219-20 (stating that impact of *Lopez* is philosophical not practical); *see also supra* note 68 (discussing impact of *Lopez* on Commerce Clause jurisprudence).

[127] *See* McAllister, *supra* note 30, at 219-20 (stating that *Lopez* is likely to affect only first two categories of legislation).

[128] *See Lopez*, 514 U.S. at 561-62 (explaining jurisdictional element as means of assuring activity in question affects interstate commerce).

[129] *See id.*

[130] *See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 786 (W.D. Va. 1996) (stating that neither VAWA, nor Gun-Free Schools Act regulates channels of interstate commerce or transportation of commodity in interstate commerce); *see also supra* notes 53-58 and accompanying text (discussing rationale of *Lopez* decision).

[131] *See Brzonkala*, 935 F. Supp. at 786-93.

[132] *See* S. REP. NO. 103-138, at 48-50 (1993); *Hearing on S. 15*, *supra* note 14, at 87-88 (quoting Professor Cass R. Sunstein, University of Chicago School of Law) (advising Congress to make connection to interstate commerce explicit). Congressional findings alone, however, do not demonstrate a substantial effect on interstate commerce. *See Lopez*, 514 U.S. at 562. While such findings are helpful, they will not preclude the Court from scrutinizing legislation passed pursuant to the Commerce Clause power. *See id.*; *see also supra* note 28 (discussing congressional findings on effects of gender-based violence on interstate commerce).

[133] *See* S. REP. NO. 103-138, at 54-55 (1994).

[134] *See id.*

ognized that gender-based violence costs taxpayers millions of dollars each year in health care expenses.[135]

Congress's findings on gender-based violence, however, fail to distinguish it from other crimes.[136] In *Lopez*, for example, the government's argument that guns in schools affect interstate commerce was based on findings similar to those in VAWA.[137] According to the Supreme Court in *Lopez*, these effects were not substantial enough to justify federal regulation of guns in schools pursuant to the Commerce Clause.[138] Similarly, the *Brzonkala* court held that Congress's findings regarding VAWA were insufficient to invoke the Commerce Clause power.[139]

Interestingly, the *Brzonkala* court used insomnia as an analogy to gender-based violence to demonstrate the need for a logical limit to Congress's power under the Commerce Clause.[140] The court reasoned that if Congress can regulate gender-based violence under the Commerce Clause, then it could also regulate insomnia.[141] Insomnia, like gender-based violence, increases health care costs and causes individuals to be

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[135] *See id.*

[136] *See Brzonkala*, 935 F. Supp. at 793.

[137] *See id.* at 790-91. Proponents of VAWA and the Gun-Free Schools Act both argued that the regulated activity reduced individuals' willingness to travel interstate. *See id.* Additionally, both argued that gender-based violence and guns in schools lead to a less productive citizenry that affects the national economy. *See id.*; *see also supra* note 54 (detailing government's argument in *Lopez* that guns in schools affect interstate commerce).

[138] *See* United States v. Lopez, 514 U.S. 549, 563-65 (1995).

[139] *See Brzonkala*, 935 F. Supp. at 792-93; *see also Lopez*, 514 U.S. at 564 (noting that without limits to Commerce Clause, Court would be "hard pressed to posit any activity by an individual that Congress [would be] without power to regulate").

Congress's finding that women may be fearful of interstate travel does not provide a concrete connection to interstate commerce. *See Brzonkala*, 935 F. Supp. at 792-93. VAWA authorizes suits by victims of gender-based violence, regardless of whether or not they travel between states. *See* 42 U.S.C. § 13981 (1994); *see also Brzonkala*, 935 F. Supp. at 792. Because congressional findings do not mention perpetrators' travel between states, they too fail to provide a jurisdictional nexus. *See Brzonkala*, 935 F. Supp. at 792-93. That is, VAWA authorizes suits against anyone who perpetrates gender-based violence, whether or not they travel between states. *See id.* Thus, neither those who suffer from this violence, nor those who perpetrate it, are necessarily connected to interstate commerce. *See id.* at 791-93.

[140] *See Lopez*, 514 U.S. at 553-59 (searching for definable limit to Congress's power under Commerce Clause); *Brzonkala*, 935 F. Supp. at 792-93; *see also* McAllister, *supra* note 30, at 228 (stating that it is contrary to Tenth Amendment to allow Congress to use Commerce Clause to expand federal government's role).

[141] *See Brzonkala*, 935 F. Supp. at 793.

less productive in the workplace.[142] Therefore, the court concluded, insomnia affects the national economy.[143] As the court noted though, an effect on the national economy is not always a "substantial" effect on interstate commerce.[144]

Gender-based violence differs from insomnia, however, because it is a form of sex discrimination.[145] Individuals who suffer from insomnia do not experience the degradation, humiliation, and fear experienced by victims of gender-based violence.[146] Section 5 of the Fourteenth Amendment grants Congress the power to pass legislation aimed at eliminating sex discrimination regardless of its effect on interstate commerce[147] and to enforce the equal protection of the laws.[148]

B. The Fourteenth Amendment Enforcement Provision: An Alternative Constitutional Authority for VAWA

As *Brzonkala* confirms, Congress can no longer rely on the Commerce Clause as constitutional authority to enact VAWA and other civil rights legislation.[149] Because *Lopez* ended fictitious claims of effects on interstate commerce, Congress must seek an

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[142] *See id.*

[143] *See id.*

[144] *See id.* at 792. The *Brzonkala* court explained that an effect on the national economy can not be used interchangeably with an effect on interstate commerce. *See id.* If an effect on the national economy were enough for Congress to invoke the Commerce Clause power, then Congress's regulatory power would be unlimited. *See id.* at 792-93. Nearly every activity affects the national economy in some way. *See id.* at 793. The national economy, in turn, affects interstate commerce. *See id.* To extend the Commerce Clause power to all such activities, however, would impermissibly allow Congress to regulate those activities traditionally left to the states' control. *See id.*

[145] *See* S. REP. NO. 103-138, at 48 (1993) (declaring gender-based violence form of discrimination).

[146] *See id.* at 49 (recognizing emotional consequences of gender-based violence).

[147] *See* Kampourakis & Tarr, *supra* note 47, at 217 (arguing that Fourteenth Amendment is alternative to Commerce Clause for congressional authority to enact civil rights legislation).

[148] *See* U.S. CONST. amend. XIV, § 5; Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (describing § 5 as positive grant of power to enforce Fourteenth Amendment's guarantees).

[149] *See Brzonkala*, 935 F. Supp. at 793; Kampouakis & Tarr, *supra* note 47, at 194 (describing *Lopez* as limiting Congress's ability to protect individual liberties).

alternative source of constitutional authority for VAWA.[150] The *Brzonkala* court relied on the *Civil Rights Cases* and a narrow textual reading of the Fourteenth Amendment to rule that the Fourteenth Amendment's Enforcement Provision does not empower Congress to regulate private actions.[151] Since the 1886 *Civil Rights Cases*, however, the Court has suggested that it may reconsider its interpretation of the Enforcement Provision.[152]

By its terms, the Fourteenth Amendment restricts state action, not private conduct.[153] The type of state action prohibited by the Equal Protection Clause, however, may be different than that prohibited by the Enforcement Provision.[154] Because section 5 augments Congress's power to enforce the Equal Protection Clause, Congress may be able to legislate upon a lesser showing of state action.[155] Thus, while courts may decline to recognize that gender-based violence violates the Fourteenth Amendment, Congress is not precluded from doing so pursuant to its power to enforce the Amendment's guarantees.[156]

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[150] *See* McAllister, *supra* note 30, at 225 (describing Congress as engaging in political grandstanding without giving any thought to VAWA's actual connection to interstate commerce); Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of* United States v. Lopez, 34 DUQ. L. REV. 1, 97 (1995) (concluding that *Lopez* created more stringent test for permissible Commerce Clause regulation).

[151] *See Brzonkala*, 935 F. Supp. at 793-801.

[152] *See* United States v. Guest, 383 U.S. 745, 754-55, 761-62, 777 (1966) (stating in dictum that Congress has authority to regulate private behavior under § 5); Griffin v. Breckenridge, 403 U.S. 88, 167 (1971) (implying Enforcement Provision of Fourteenth Amendment may provide Congress with authority to impose liability on individuals for race-based conspiracies). The Supreme Court's uncertainty in this area has led to confusion in the lower courts. *See* United States v. Bledsoe, 728 F.2d 1094, 1097 (8th Cir. 1984) (holding that § 5 grants Congress power to reach purely private action), *and* Action v. Gannon, 450 F.2d 1227, 1235 (8th Cir. 1971) (holding that § 5 grants Congress power to reach purely private action).

[153] *See* U.S. CONST. amend. XIV, § 5; *see also supra* notes 66-72 and accompanying text (discussing history of state action requirement). *See generally* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

[154] *See* Cox, *supra* note 69, at 102 (arguing that state action may not be required for Congress to legislate under § 5); *see also supra* notes 68-69 and accompanying text (providing historical basis for § 5's different state action requirement).

[155] *See* Tribe, *supra* note 72, at 298 (stating that once Congress concludes states are unwilling or unable to protect against private acts that threaten constitutional rights, § 5 permits Congress to act); *see also supra* notes 31-33 and accompanying text (discussing legislative history of § 5).

[156] *See* Katzenbach v. Morgan, 384 U.S. 641, 648-51 (1966) (holding that Congress may prohibit acts under § 5 of Fourteenth Amendment even though Supreme Court has determined those acts do not violate § 1).

The Supreme Court has held that the state may have a duty to act when the conduct of private individuals violates the Fourteenth Amendment.[157] Under these circumstances, federal legislation is appropriate.[158] Thus, when private individuals violate the Fourteenth Amendment and the state fails to act, the state's acquiescence should satisfy a lesser showing of state action in a manner consistent with the requirements of section 5.[159] Congress may enact remedial legislation[160] under the Enforcement Provision to protect individuals when the state has failed to do so.[161]

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[157] *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) (recognizing that Constitution imposes upon states affirmative duties of care and protection with respect to particular individuals in certain limited circumstances); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) (noting that when state law compels act, state is responsible for private actors); Taylor v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (finding state action where state failed to protect one confined to state mental health facility).

[158] *See* LEWIS, *supra* note 33, at 4 (arguing that Congress may regulate private behavior if such regulation might reasonably promote equal protection of laws); Chemerinsky, *supra* note 154, at 510, 515-17 (arguing that where state common law falls short, Fourteenth Amendment should provide shield against infringements of basic rights by private actors); Gormley, *supra* note 120, at 584 (arguing that Congress should be able to use § 5 enforcement powers when states have allowed particular group to be denied equal protection); Tribe, *supra* note 72, at 298 (stating that state failure to protect against private acts that threaten constitutional rights warrants federal legislation). *But see* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 799 (W.D. Va. 1996) (explaining that state inaction cannot be construed as state authorization or encouragement).

[159] *See* Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1081 (1990) (recognizing that state inaction may constitute state action for purposes of Fourteenth Amendment); Gormley, *supra* note 120, at 584-85 (arguing unwitting state involvement is state action nonetheless).

[160] *See* United States v. Guest, 383 U.S. 745, 754-55 (1966) (explaining that rights under Equal Protection Clause arise only when there has been involvement of state, whereas remedial rights are those created by Congress under § 5).

[161] *See Hearing on S. 15*, *supra* note 14, at 104 (quoting Professor Cass R. Sunstein, University of Chicago School of Law) (opining that Congress may act under § 5 because criminal justice system is failing to provide women equal protection of laws in classic sense); Tribe, *supra* note 72, at 298 (arguing that in some situations Congress should supplement state efforts with federal legislation under Fourteenth Amendment).

In order for VAWA to be a constitutional exercise of section 5 authority, however, it must be a legitimate remedy for a legitimate equal protection concern.[162] The *Brzonkala* court held that because VAWA regulates private action and the state is not responsible for an individual criminal's actions, VAWA is not a legitimate remedy under the Fourteenth Amendment.[163] Although VAWA does not regulate the state's actions, it is an ancillary remedy ensuring equal treatment of individuals by government.[164] VAWA is a legitimate remedy because it provides women with a means to redress violent sex discrimination in the face of state inaction.[165]

In enacting VAWA, Congress endeavored to assure equal protection of the laws to women.[166] Congress found that discrimination, bias, and other inadequacies in state criminal justice systems deny women equal treatment under the law.[167] By providing women with an alternative forum in which to seek

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[162] *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (articulating framework to evaluate legislation passed pursuant to § 5 powers); *see also supra* notes 73-84 and accompanying text (discussing holding in *Morgan*).

[163] *See Brzonkala*, 935 F. Supp. at 797-801.

[164] *See* S. REP. NO. 103-138, at 55 (1993) (stating that VAWA's civil rights remedy secures guarantees of Fourteenth Amendment because it attacks gender-motivated crimes that threaten women's equal protection of laws and it provides necessary remedy to fill gaps and rectify biases of state laws).

[165] *See Guest*, 383 U.S. at 777 (Brennan, J., concurring in part and dissenting in part) (stating Congress may create private remedy as effective means to combat discrimination); *Hearing on S. 15*, *supra* note 14, at 117-18 (quoting Professor Cass R. Sunstein, University of Chicago School of Law) (observing that VAWA's goal is consistent with core purpose of Fourteenth Amendment: to ensure that state criminal justice systems do not discriminate in protecting citizens); David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163, 187-88 (1993) (arguing that congressional findings on bias and discrimination in state criminal justice systems indicate sufficient state involvement for Congress to act under § 5).

[166] *See* S. REP. NO. 103-138, at 55.

[167] *See id.* at 49-50; *see also supra* note 27-28 and accompanying text (discussing congressional findings on violence against women).

justice for these crimes,[168] Congress acted to address a legitimate equal protection concern.[169]

The *Brzonkala* court failed to recognize that Congress may use the Enforcement Provision to articulate and enforce the Fourteenth Amendment's protections.[170] In Congress's estimation, the Fourteenth Amendment protects women from gender-motivated crimes.[171] Thus, VAWA vindicates a federal

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[168] *See* S. REP. NO. 103-138 at 55. The federal system provides victims of gender-based violence a better opportunity to vindicate their rights. *See* District of Columbia v. Carter, 409 U.S. 418, 426 (1973) (citing legislative history of 1871 Civil Rights Act and stating that federal courts are further above local influence than state courts and, therefore, federal judges will rise above prejudices and passions); *see also* Hallock, *supra* note 14, at 600-03 (listing several reasons why federal courts are preferable to state courts for litigation of civil rights). Although federal courts may be better suited to administer the law in a non-discriminatory manner than state courts, they are not without gender bias or immune to gender stereotypes. *See id.* at 601; *see also, e.g.,* RICHARD A. POSNER, SEX AND REASON 384 (1992) (stating that rape is substitute for consensual intercourse and not manifestation of male hostility toward women). For example, Judge Kiser's characterization of date rape as a "situation where a man's sexual passion provokes the rape by decreasing the man's control," Brzonkala v. Virginia Polytechnic and State Univ., 935 F. Supp. 779, 785 (W.D. Va. 1996), displays, at best, a profound misunderstanding of sexual assault. *See* A. Nicholas Groth & Ann W. Burgess, *Rape: A Sexual Deviation, in* MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSIONS 231, 232-35 (Anthony M. Scacco, Jr., ed. 1982) (stating that myth of rape as crime of passion persists despite experts' recognition of rape as crime of violence); *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 878 (1990) (citing study that found that 50% of students surveyed believed dressing provocatively and walking alone in evening invites rape); *see also supra* note 27 (discussing gender bias in courts).

[169] *See* S. REP. NO. 103-138, at 55 (stating that women as class do not receive equal protection from irrational, hate-motivated abuse and assault); *see also* Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) (considering express congressional intent to secure rights under Fourteenth Amendment in enacting Voting Rights Act of 1965).

[170] *See Brzonkala*, 935 F. Supp. at 795-801; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (describing § 5 as granting Congress power to define situations which threaten principles of equality); *Morgan*, 384 U.S. at 651 (describing Fourteenth Amendment as primarily augmenting power of Congress rather than judiciary); Cox, *supra* note 69, at 102 (holding that § 5 power permits Congress to expand Fourteenth Amendment protections beyond those acts protected against by section 1).

[171] *See* 42 U.S.C. § 13981(b) (1994). VAWA recognizes violent criminal attacks on women as gender discrimination. *See* S. REP. NO. 103-138, at 48. Catharine MacKinnon argues that the act of rape discriminates against women in the same way that the lynching of Blacks during Reconstruction discriminated against African-Americans:

> [Rape] is a violent humiliation ritual with sexual elements in which the victims are often murdered. It could be done to members of powerful groups but hardly ever is. When it is done, it is as if it is what the victim is for; the whole target population cringes, withdraws, at once identifies and disidentifies in terror. The exemplary horror keeps the group smaller, quieter, more ingratiat-

right secured by the Fourteenth Amendment.[172] Because states are either unable or unwilling to fully protect women from violent gender-based crime,[173] the Enforcement Provision empowers Congress to provide women with a means of redress.[174]

CONCLUSION

Brzonkala could be the constitutional test case for VAWA.[175] If *Lopez* even slightly limits Congress's power under the Commerce Clause, VAWA is an illegitimate exercise of the Commerce Clause power.[176] To protect civil liberties, however, Congress need not rely on the Commerce Clause.[177] Section 5

> ing. The legal system is dominated by members of the same group engaged in the aggression. The practice is formally illegal but seldom found to be against the law. The atrocity is de jure illegal but de facto permitted.

Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1303 (1991).

[172] *See* 42 U.S.C. § 13981(b) (1994); *see also* Maloney, *supra* note 14, at 1899 (arguing VAWA's announcement of right to be free from gender-based violence broadcasts powerful message to entire country). Of course, as the Court noted in *Flores*, Congress's determination is not dispositive. Although Congress is entitled to great deference when it legislates pursuant to section 5, the Court retains the power to determine whether Congress exceeded its authority. City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997).

[173] *See* S. REP. NO. 103-138, at 49-50, 55 (recognizing bias and discrimination in state criminal justice systems); *see also supra* note 27 and accompanying text (discussing congressional findings on bias and discrimination).

[174] *See J.A. Croson Co.*, 488 U.S. at 490 (stating that § 5 grants Congress power to adopt prophylactic rules to address equal protection violations); *Morgan*, 384 U.S. at 648 (stating that Congress may enact all legislation necessary and proper to enforce guarantees of Fourteenth Amendment).

[175] *See supra* note 5 and accompanying text (stating that Brzonkala is only one of two women to sue under VAWA). *Brzonkala* may well be the test case for the Enforcement Provision as well. *See* Tribe, *supra* note 72, at 298 (noting that Court has not confronted extent to which state action requirement limits congressional power to enforce Fourteenth Amendment since *Guest* and *Morgan*).

[176] *See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 793 (W.D. Va. 1996) (declaring that VAWA is unconstitutional under Commerce Clause because VAWA and Gun-Free Schools Act are not significantly different). *Compare* Council for Life Coalition v. Reno, 856 F. Supp. 1422, 1431 (S.D. Cal. 1994) (holding Freedom to Clinic Entrances Act is constitutional exercise of Commerce Clause in pre-*Lopez* case) *with* Hoffman v. Hunt, 923 F. Supp. 791, 819 (W.D. N.C. 1996) (post-*Lopez* case holding Freedom to Clinic Entrances Act unconstitutional exercise of Commerce Clause), *and* United States v. Wilson, 880 F. Supp. 621, 634 (E.D. Wis. 1995) (holding Congress may not enact Freedom to Clinic Entrances Act pursuant to Commerce Clause power in post-*Lopez* case).

[177] *See supra* Part III.B (arguing § 5 enables Congress to enact legislation to ensure guar-

of the Fourteenth Amendment empowers Congress to enact legislation such as VAWA to ensure equal protection of the laws.[178]

Brzonkala presents a rare and important opportunity for the federal judiciary to give the Enforcement Provision an expansive reading that allows Congress to regulate private individuals.[179] Although it cannot regulate all private behavior pursuant to the Enforcement Provision, Congress must be able to reach behavior that deprives a class of persons equal protection of the laws.[180] The Enforcement Provision provides Congress with the precise constitutional authority to address the states' failure to protect women from gender-based violence.[181]

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antees of Fourteenth Amendment).

[178] *See Hearing on S. 15, supra* note 14, at 124 (quoting Professor Cass R. Sunstein, University of Chicago School of Law) (stating that VAWA is constitutional under § 5); *see also supra* Part III.B (arguing Enforcement Provision should be interpreted to regulate private individuals).

[179] *See* HARRIS, *supra* note 71, at 33-56 (arguing that framers of Fourteenth Amendment intended Congress to be able to reach private behavior with § 5); Chemerinsky, *supra* note 31, at 1147-48 (arguing that framers of Fourteenth Amendment intended Congress to be able to reach private behavior with § 5); Frantz, *supra* note 71, at 1356-57; *see also supra* notes 157-69 and accompanying text (arguing for broader interpretation of Enforcement Provision).

[180] *See Hearing on S. 15, supra* note 14, at 120-24 (quoting Professor Cass R. Sunstein, University of Chicago School of Law) (stating that VAWA is appropriate legislation under § 5 if Congress finds state criminal justice systems are failing to provide women equal protection of laws); *see also supra* notes 157-61 and accompanying text (arguing state inaction fulfills state action requirement).

[181] *See* S. REP. NO. 103-138, at 49-50, 55.