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NOTES

UNITED STATES v. MORRISON 15 YEARS LATER: HOW THE SUPREME COURT'S DISJOINTED ADJUDICATION OF COMMERCE CLAUSE LEGISLATION OPENS A BACK DOOR TO RESTORING FEDERAL CIVIL RECOURSE FOR CERTAIN VICTIMS OF GENDER-BASED VIOLENCE

Ann Schober

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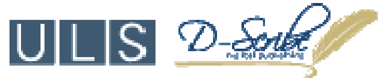

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NOTES

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Ann Schober[*]

I. INTRODUCTION

In May 2000, the United States Supreme Court in *United States v. Morrison* struck down § 13981 of the Violence Against Women Act (VAWA), a provision that allowed victims of gender-based violence (GBV) to sue their perpetrators civilly in federal court.[1] Section 13981 was enacted pursuant to section 5 of the Fourteenth Amendment to the Constitution, as well as under Section 8, Clause 3 of Article I of the Constitution (the "Commerce Clause").[2] Although the *Morrison* Court struck down the provision under both constitutional directives, this note will concern itself exclusively with the Commerce Clause challenge to § 13981.

The Commerce Clause allows Congress "[t]o regulate Commerce with foreign Nations, and among the several States."[3] Federal legislators rely on this language to justify regulating interstate and intrastate activity provided the activity affects, in some way, interstate commerce.[4] Congress enacted

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[*] Candidate for J.D., May 2016, University of Pittsburgh School of Law.
[1] 529 U.S. 598, 601–02, 617 (2000).
[2] 42 U.S.C. § 13981 (1994).
[3] U.S. CONST. art. I, § 8, cl. 3.
[4] United States v. Lopez, 514 U.S. 549, 552–57 (1995).

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§ 13981 asserting that the effects of GBV—a state "activity" generally tried through state courts—have an effect on interstate commerce.[5] Through voluminous pre-VAWA hearings and findings, Congress concluded violence against women had a profound impact on the nation's economy.[6]

There is a long and complex history behind Congressional regulation of state activity via the Commerce Clause and the Supreme Court's subsequent adjudication of it. But the Supreme Court's Commerce Clause jurisprudence has created an unintended incoherency among its holdings such that they cannot be applied today in any serviceable way. The Court's endeavor to find a sound, predictable application that will produce consistent Commerce Clause rulings has proved elusive, creating untenable, formalistic standards that have been manipulated by courts and legislators alike in determining which activities can be federally regulated. This unruliness opens the door for redrafting Violence Against Women legislation to restore the right of certain victims of GBV to sue their perpetrators civilly in federal court. Part II of this note will give a broad overview of the VAWA, its origin and goals. Part III will provide a synopsis of *United States v. Morrison* and historicize other landmark Supreme Court Commerce Clause cases. Part IV discusses the inconsistencies of this jurisprudence and the resulting difficulties in trying to apply its precedent. Part V examines the opportunities that have emerged from this discord to restore the federal civil remedy provision of the VAWA for certain victims of GBV.

II. OVERVIEW OF THE VIOLENCE AGAINST WOMEN ACT—ITS ORIGIN AND GOALS

Violence against women is defined as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or

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[5] *See Terrorism in the Home: Hearing before the Subcomm. on Children, Family, Drugs and Alcoholism, Domestic Violence of the S. Comm. on Labor and Human Res.*, 101st Cong. (1990); *Women and Violence: Hearing before the S. Comm. on the Judiciary*, 101st Cong. (1990); *Violence Against Women: Victims of the System: Hearing before the S. Comm. on the Judiciary*, 102d Cong. (1991); *Violence Against Women: Hearing before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 102d Cong. (1992); *Crimes of Violence Motivated by Gender: Hearing before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. (1993).

[6] United States v. Morrison, 529 U.S. 598, 614–15 (2000).

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psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[7] Congress enacted the VAWA—named so because the majority of victims of domestic violence are women and children[8]—to address violent crime in the United States.[9] The Act, which applies to all victims of domestic violence irrespective of their gender,[10] provides, among other things, funding for state and local law enforcement entities to enhance investigative and prosecutorial services to demographically diverse victims of domestic violence, sexual assault, dating violence and stalking.[11] At the time of the VAWA's enactment, these services were considered grossly inadequate at the state and local levels.[12] The Act has been reauthorized three times since its initial passage, mostly intact and with some expansions.[13]

The provision of the VAWA struck down in *Morrison*, 42 U.S.C. § 13981, stated:

> it is the purpose of . . . [§ 13981] to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.[14]

A successful plaintiff suing under § 13981 could be awarded compensatory and punitive damages, injunctive and declaratory relief as well as attorneys' fees.[15]

Why was it so important for victims of GBV to have this federal civil recourse when they already had criminal and civil recourse in the state courts? Among the many reasons espoused in briefs of and for the petitioner in *Morrison*, was that § 13981 conveys the message that GBV

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[7] G.A. Res. 48/104, at 3, U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

[8] National Task Force to End Sexual and Domestic Violence Against Women, Frequently Asked Questions about VAWA and Gender, at 1, *available at* http://www.ncdsv.org/images/FAQ_VAWA%20and%20Gender.pdf.

[9] 42 U.S.C. § 13981.

[10] National Task Force to End Sexual and Domestic Violence Against Women, *supra* note 8, at 1.

[11] LISA N. SACCO, CONG. RESEARCH SERV., R42499, *The Violence Against Women Act: Overview, Legislation, and Federal Funding* (2015).

[12] S. REP. NO. 102-197, at 43–47 (1991).

[13] SACCO, *supra* note 11, at 9–10.

[14] 42 U.S.C. § 13981 (1994).

[15] *Id.*

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will not be tolerated and is serious enough to warrant federal attention.[16] The intent of the civil rights remedy was to "help shift public perception of domestic and sexual violence from a private matter to a civil rights issue."[17] More importantly, advocates argued, § 13981 was necessary as Congress found compelling evidence that existing state efforts were inadequate in providing meaningful relief for victims of GBV.[18] Congress concluded that bias in state justice systems, such as discriminatory stereotyping of victims of GBV, often resulted in insufficient investigation and prosecution of these crimes and unacceptably lenient punishment for those perpetrators actually convicted.[19] Many advocates against GBV allege the criminal system is completely incapable of deterring and punishing GBV and insist victims need the weapon of a civil suit.[20]

It is easier for a victim of GBV to prevail in a civil proceeding as opposed to a criminal one.[21] The fact finder in a civil proceeding uses a

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[16] *See* Brief of Senator Joseph R. Biden, Jr. as Amicus Curiae in Support of Petitioners at 14, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); *see* Brief of Law Professors as Amici Curiae in Support of Petitioners at 3, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); *see* Brief of Petitioner Christy Brzonkala at 17, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); *see* Brief for the United States at 10, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); *see* Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners' Brief on the Merits, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

[17] Irin Carmon, *How the Supreme Court Turned its Back on Domestic Violence*, MSNBC (Sept. 17, 2014, 5:54 PM), http://www.msnbc.com/msnbc/how-the-supreme-court-turned-its-back-domestic-violence (quoting Julie Goldscheid, an attorney who defended the constitutionality of the civil rights remedy of the 1994 Violence Against Women Act in courts nationwide and before the U.S. Supreme Court in *United States v. Morrison*).

[18] *See* H.R. REP. NO. 103-711, at 385–86 (1994); S. REP. NO. 103-138, at 38, 41–55 (1993); S. REP. NO. 102-197, at 33–35, 41, 43–47 (1991).

[19] *See* H.R. CONF. REP. NO. 103-711, at 385–86 (1994); *see* Krista M. Anderson, *Twelve Years Post* Morrison*: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims By Rape Survivors*, 36 HARV. J.L. & GENDER 223, 225 (2013); *see* Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 924–39 (2001); *see* Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 74, 140–42 (2002).

[20] *See* Brief of Senator Joseph R. Biden, Jr. as Amicus Curiae in Support of Petitioners at 20–30, *Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); *see* Brief of Law Professors as Amici Curiae in Support of Petitioners at 18–25. *Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); *see* Brief of Petitioner Christy Brzonkala at 29–31, *Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); *see* Brief for the United States at 36–42, *Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); *see* Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners' Brief on the Merits at 15–20, *Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

[21] Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1574–75 (2008).

lower burden of proof to determine liability.[22] Instead of determining whether a defendant is guilty "beyond a reasonable doubt," as is done in a criminal proceeding, a plaintiff in a civil suit need only prove the allegations by "a preponderance of the evidence."[23] Victims cannot send their perpetrators to prison by suing them, but the damages they can be awarded are another type of punishment that can help replace a victim's lost income and pay for counseling.[24]

After *Morrison*, a few states responded by passing their own versions of § 13981.[25] However, in most states, victims of GBV have yet to recover the legal advantages lost when § 13981 was struck down.[26] Most state remedies have short statute of limitations, do not address all forms of GBV and do not award attorneys' fees.[27] The VAWA's civil remedy made it easier for victims to find attorneys to take their cases because it encouraged courts to award attorneys' fees to successful plaintiffs.[28]

Vice President Joe Biden recently voiced his desire to restore § 13981 and wants to "convene a summit to figure out how to get [the civil remedy] back in."[29] He wants victims "to be able to go into court and take away the car, the job, the money, whatever it was . . . because their civil rights had been violated."[30] Julie Goldscheid, an attorney who argued on behalf of the petitioner in *Morrison*, says restoring the federal civil remedy for certain victims of GBV is a possibility:

> From a constitutional perspective, there's at least one way to do it . . . Congress could allow such suits where there's a connection to interstate commerce,

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[22] *Id.* at 1575.

[23] *Id.* at 1574.

[24] *Id.*

[25] Hannah Brenner, *Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 322 (2013); Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157, 165–66 (2005).

[26] *See* Anderson, *supra* note 19, at 239–41, 249, 251, 266–68.

[27] Alexandra Brodsky, *All Survivors, Not Just Students, Need Civil Law Options*, FEMINISTING (Feb. 1, 2015), http://feministing.com/2015/01/02/all-survivors-not-just-students-need-civil-law-options/.

[28] ENCYCLOPEDIA OF DOMESTIC VIOLENCE AND ABUSE 527 (Laura L. Finley ed., 2013).

[29] Gregory Korte, *Biden Wants Victims of Sexual Assault to be Able to Sue*, USA TODAY (Sept. 9, 2014, 7:25 PM), http://www.usatoday.com/story/news/politics/2014/09/09/biden-ray-rice-domestic-violence/15333095/.

[30] *Id.*

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> broadly defined: If someone lost their job, had to drop out of school, had to flee out of state, or lived in one state and the abuse happened in another.[31]

III. *United States v. Morrison* and Its Place in Commerce Clause Jurisprudence

Christy Brzonkala, the petitioner in *Morrison*, used § 13981 to sue her alleged rapists in federal court for violating her civil rights.[32] The respondents moved to dismiss the suit, in part, on grounds it was unconstitutional for Congress to enact § 13981 as it exceeded Congress' commerce powers.[33] The United States joined Brzonkala in defending § 13981's constitutionality.[34] They argued that, through the Court's use of the "rational basis test,"[35] § 13981 could be classified as a regulation of intrastate activity that, in the aggregate, substantially affects interstate commerce.[36]

The Court held that Congress exceeded its commerce power in enacting § 13981.[37] It stated that crimes of GBV are not, in and of themselves, economic activity and therefore too far removed from their effect on interstate commerce.[38] The Court hypothesized the petitioner's reasoning would allow Congress to regulate any state activity that, in the aggregate, had a substantial effect on the nation's economy.[39]

To understand how Congress can rewrite legislation capable of restoring the VAWA's civil remedy for certain victims of GBV, we must track the evolution of the Supreme Court's Commerce Clause jurisprudence. For much of the nineteenth century, Congress' commerce

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[31] *Id.*

[32] United States v. Morrison, 529 U.S. 598, 601–04 (2000).

[33] *Id.* at 604.

[34] *Id.*

[35] 16B C.J.S. *Constitutional Law* § 1279 (2014) ("Where a classification does not involve suspect criteria or fundamental rights, it is examined under the relatively relaxed rational basis standard which requires only that the classification rationally or reasonably further a legitimate governmental purpose.").

[36] Brief of Petitioner Christy Brzonkala at 26–29, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29); Brief for the United States at 15–28, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

[37] *Morrison*, 529 U.S. at 627.

[38] *Id.* at 613.

[39] *Id.* at 612–13.

power was sidelined primarily because proponents of the "interstate" slave trade feared Congress would use the power to regulate or perhaps ban slavery.[40] After the Civil War, the United States became increasingly industrialized, national economic problems emerged, and Congress began to regulate interstate commerce more deeply.[41] As Congress' regulation of state activity became more contested, the courts reacted by developing a framework for determining when Congress could regulate an intrastate activity.[42] Two broad formulas were created: (1) if the intrastate activity had a direct effect on interstate commerce, Congress could regulate it. However, if the effect was only indirect, Congress could not regulate it; and (2) Congress could regulate commerce but not production or manufacturing.[43]

This was the status quo until the Great Depression.[44] President Franklin D. Roosevelt's efforts to overcome the Depression involved passing federal legislation to regulate the nation's economy.[45] Congress, as part of the New Deal and under its Commerce Clause authority, passed a series of statutes designed to regulate the ailing economy.[46] Businesses affected by the new laws turned to the courts, contesting Congress' power to regulate their operations.[47]

In the mid-1930s, two Supreme Court cases, *Schechter Poultry Corporation v. United States* and *Carter v. Carter Coal Company*, challenged federal legislation requiring their businesses to comply with various fair labor and competition codes. In *Schechter*, the Court held that the petitioner's slaughtering of chickens, bought locally and sold locally, did not have a direct enough effect on interstate commerce to be regulated in this way.[48] The *Carter* case involved the production of coal.[49] The Court

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[40] *See* DAVID L. LIGHTNER, SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR 65–88 (2006).

[41] JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002, at 87 (2003).

[42] *See* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 5–6 (2001).

[43] *See* VILE, *supra* note 41, at 88.

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See* VILE, *supra* note 41, at 117.

[48] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546–51 (1935).

again reined in Congress' commerce power by using the direct versus indirect effect analysis, which determined that mining for coal is not commerce, but instead production, and that its relationship with interstate commerce was too indirect.[50]

As the Depression and its accompanying labor strife continued, the Roosevelt Administration enacted, via its commerce powers, the National Labor Relations Act (NLRA), which allowed workers to unionize.[51] One of the nation's largest steel companies, Jones & Laughlin (J & L), challenged the NLRA in 1937.[52] The Court affirmed the statute, essentially discarding the "direct vs. indirect" and "commerce vs. production" tests.[53] Instead the Court's rational-basis analysis focused on the reality of the nation's economic despair and the desperate need to fix it by stating that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[54]

In 1941, the Supreme Court further departed from its pre-1937 Commerce Clause jurisprudence when it upheld, in *United States v. Darby*, the Fair Labor Standards Act of 1938.[55] The Court held unanimously that Congress' commerce power permitted federal regulation of employment conditions.[56] *Darby* overturned *Hammer v. Dagenhart*, which held federal regulation of intrastate child labor for the manufacture of products that may never reach the stream of interstate commerce, was beyond Congress' commerce powers.[57]

Wickard v. Filburn, a 1942 Supreme Court case, stemmed from a challenge to a provision of the 1938 Agricultural Adjustment Act (AAA) that limited farmers from growing more than an allotted quota of wheat in

[49] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[50] *See id.* at 309–11.
[51] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22–24 (1937).
[52] *See id.*
[53] *See id.*
[54] *Id.* at 37.
[55] *See* United States v. Darby, 312 U.S. 100 (1941).
[56] *See id.*
[57] *Id.* at 115–17.

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an effort to stabilize the nation's wheat market.[58] Filburn, an Ohio farmer, contested the quota because any amount of wheat he grew above his quota was strictly for personal consumption and was therefore a wholly intrastate, non-commercial activity.[59] The Court held the production quotas constitutional as applied to wheat grown for personal consumption, extending federal regulation to production of commodities not intended for intrastate or interstate commerce.[60] As it did in *J & L*, the *Wickard* Court rejected the use of constitutional formulas in favor of a rational-basis analysis to resolve a national crisis.[61] Filburn's surplus wheat alone was insignificant.[62] However, if all wheat farmers grew a surplus it would lower the demand and price of wheat.[63] These farmers would not have to go to the market to buy wheat for their own consumption.[64] The Court, by not focusing on the individual (Filburn) but rather on the class of individuals represented (wheat farmers), held that if the aggregate result of the intrastate activity "exerts a substantial economic effect on interstate commerce," Congress can regulate it via its commerce powers.[65]

In the 1960s, Congress enacted landmark civil rights legislation prohibiting private businesses from discriminating against individuals on the basis of race, color, religion, or national origin.[66] However, these laws were not enacted under the Equal Protection Clause of the Fourteenth Amendment.[67] Instead, they were enacted pursuant to the Commerce Clause because the Fourteenth Amendment had been construed to only apply to state governmental action and not to private action.[68] Therefore, Congress was reluctant to pass civil-rights legislation under the Fourteenth Amendment in fear it would be struck down.[69] This legislation was

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[58] *See* Wickard v. Filburn, 317 U.S. 111 (1942).
[59] *See id.*
[60] *See id.*
[61] *See id.*
[62] *Id.* at 127–28.
[63] *See id.*
[64] *See* Wickard v. Filburn, 317 U.S. 111, 127 (1942).
[65] *Id.* at 125.
[66] Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).
[67] OTIS STEPHENS, JR. & JOHN SCHEB, AMERICAN CONSTITUTIONAL LAW, VOLUME II: CIVIL RIGHTS AND LIBERTIES 457 (6th ed. 2015).
[68] *Id.*
[69] *See id.*

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ultimately put in front of the Supreme Court, which said blacks traveling through the country are hindered if they cannot stay in a hotel.[70] And if hotels will not serve them it affects interstate commerce, namely, the travel of blacks throughout the country.[71] In the same vein, the legislation regulated restaurants that served interstate travelers but further justified this by arguing that any restaurant that sells product procured through interstate commerce is also required to serve blacks.[72] Although Congress had no empirical evidence that requiring the service industry to serve blacks would benefit interstate commerce, the Court concluded that Congress only needed a rational basis for determining that regulating this issue would benefit interstate commerce.[73]

For over half a century, the Supreme Court did not strike down a congressional enactment as violative of Congress' Commerce Clause power.[74] Much of what Congress has done since the 1930s was a result of the expansion of Congress' commerce powers.[75]

United States v. Lopez was the first Supreme Court case since the New Deal to set limits on Congress' commerce powers.[76] The case involved the Gun-Free School Zones Act ("GFSZA"), which made it a federal crime to bring a gun into or near a school.[77] Up until *Lopez*, the Court had been using the rational basis test to determine whether a state activity substantially affected interstate commerce.[78] Did Congress have a rational basis for concluding that guns at school affect the learning environment, perhaps to the extent that many students will not go to school?[79] And if students do not go to school that they will grow into less productive adults, which in turn affects the economy and hence interstate commerce?[80] This

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[70] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964).
[71] *See id.*
[72] *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964).
[73] *Id.* at 303–05.
[74] Mark C. Christie, *Economic Regulation in the United States: The Constitutional Framework*, 40 U. RICH. L. REV. 949, 975 (2006).
[75] *See id.*
[76] *See* United States v. Lopez, 514 U.S. 549, 551 (1995).
[77] *See id.*
[78] *Id.* at 557.
[79] *See id.* at 564.
[80] *See id.*

train of thought is arguably rational.[81] The Court's reasoning, however, diverged: "We pause to consider the implications of the Government's arguments. The Government admits under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."[82] The Court argued this would encroach on the police power of the individual states.[83]

The *Lopez* Court held that, unlike the farming of wheat or the operation of a hotel, bringing a gun to school is not an economic activity.[84] So, a new test emerged: If the activity is economic in nature, use the rational basis test and aggregate the results.[85] If the results show a substantial effect on interstate commerce, Congress can regulate the activity.[86] However, if the activity is noneconomic in nature, a presumption exists against federal regulation.[87] To overcome the presumption, Congress must show a "jurisdictional element"[88] between the state activity and interstate commerce.[89]

Jump to *United States v. Morrison* (2000)—is rape an economic or noneconomic activity?[90] In the years before the VAWA's enactment, Congress, through voluminous hearings and findings, concluded that violence against women has a serious impact on the nation's economy; many women lose many days of productive work; they do not want to travel or live in certain areas; it causes millions of dollars of economic damage throughout the nation.[91] Does this make rape economic in nature?

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[81] *See id.*
[82] *Id.* at 564.
[83] *See id.* at 567.
[84] *Id.* at 559–60.
[85] *See* United States v. Lopez, 514 U.S. 549 (1995).
[86] *See id.* at 562–67.
[87] *See id.*
[88] *See id.* at 561–62 (defining the "jurisdictional element" in *Lopez* as something that ensures, "through case-by-case inquiry, that the firearm possession in question affects interstate commerce").
[89] *See id.*
[90] *See* United States v. Morrison, 529 U.S. 598 (2000).
[91] *See Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 101st Cong. 101-897 (1990); *Women and Violence: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 101-939 (1990); *Violence Against Women: Victims of the System: Hearings on S. 15 Before the S. Comm. on the Judiciary*, 102d Cong. 102-369 (1991); *Violence Against Women: Hearing Before the Subcomm. on*

The Supreme Court said no and utilized the same question posed in *Lopez*: Is the activity at issue, by its very nature, economic or noneconomic?[92] Based on this question, the Court held that raping someone is not an economic activity.[93] The Court also asserted that § 13981 contained no jurisdictional element.[94]

The next notable case in this line of Supreme Court Commerce Clause jurisprudence is *Gonzales v. Raich* (2005).[95] Although California approved the use of medicinal marijuana for persons whose physician prescribes it as a means of reducing suffering from illness, federal government officials confiscated the marijuana plants from one such patient's home.[96] The plants were illegal Schedule I drugs under the federal Controlled Substances Act (CSA)—federal legislation enacted under the Commerce Clause.[97] The CSA, a provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA), does not recognize the medical use of marijuana.[98] Two California patients who relied on their physician-prescribed marijuana challenged the CSA arguing that the Act, as applied to their conduct, was an unconstitutional exercise of Congress' Commerce Clause power.[99] The Supreme Court reasoned otherwise, holding that Congress may criminalize the production and use of homegrown marijuana even where states approve its use for medicinal purposes.[100] Using the *Lopez/Morrison* test (Is the activity, by its very nature, economic or noneconomic?), the Court recognized that growing medicinal marijuana for one's own consumption is, essentially, a noneconomic activity, which would protect the activity from federal regulation.[101] However, the key finding in *Raich* is that regulation of noncommercial, intrastate activity is

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Crime and Criminal Justice of the H. Comm. on the Judiciary, 102d Cong. 1 (1992); *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. 1 (1993).

[92] *Morrison*, 529 U.S. at 610–13.

[93] *Id.*

[94] *Id.* at 613 (describing a "jurisdictional element" as something that would establish "that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce").

[95] Gonzales v. Raich, 545 U.S. 1 (2005).

[96] *Id.* at 5–7.

[97] *Id.* at 14, 22.

[98] *Id.* at 11–14.

[99] *Id.* at 6–8, 15.

[100] *Id.* at 27–33.

[101] *Id.* at 26, 32.

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constitutionally permissible under the Commerce Clause if the regulation is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[102] This will be referred to in this note as the Broader Regulatory Scheme Doctrine.

The case on the Affordable Care Act, *National Federation of Independent Business v. Sebelius*, may have complicated things even further by adding a new dichotomy to the analysis: "activity vs. inactivity."[103] Before analyzing whether an activity is economic or noneconomic, we now must first determine if the "activity" is even an activity.[104] The Supreme Court held that requiring Americans to buy health insurance, Americans who were presently choosing not to buy it, was regulating *inactivity* and that Congress, under its commerce power, could not regulate inactivity.[105] And the Commerce Clause analysis essentially stopped there.[106] The Court did not engage in an in-depth analysis of whether regulating this "inactivity" was essential to a larger, federal regulatory scheme, such as the Affordable Care Act's "insurance reforms."[107]

IV. THE CURRENT STATE OF SUPREME COURT COMMERCE CLAUSE JURISPRUDENCE

Where do these cases leave us in regard to Supreme Court Commerce Clause jurisprudence? Is there a solid theory or test that coherently ties all of these cases together? Justice Rehnquist wrote in his majority opinion in *Lopez* that there are three broad categories of activity that Congress can regulate under its commerce powers: "the use of the channels of interstate commerce" such as interstate highways, shipping lanes, railroad systems, and the mail; "the instrumentalities of interstate commerce or persons or things in interstate commerce" such as automobiles, ships, aircraft and anything else that travels across state lines; and "those activities that

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[102] *See id.* at 24–30.
[103] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 *passim* (2012).
[104] *See id.* at 2586–87.
[105] *See id.* at 2586–91.
[106] *See id.* at 2592.
[107] *See id.* at 2591–93.

substantially affect interstate commerce."[108] It is the third category that leaves federal Commerce Clause jurisprudence in a state of instability and uncertainty.

There is clearly a struggle to find a test that applies to all Commerce Clause legislation—a formalistic categorical approach where the values of federalism do not dictate how the lines get drawn between activity that can be regulated and activity that cannot. That struggle has led to incoherence among the tests in play today. They cannot be applied in a meaningful way in a highly interconnected economy. Without a test, however, what are the Court's options? The Court could, on a case-by-case basis, deem one activity too attenuated from interstate commerce and another activity "close enough." Then the question becomes, what is too attenuated? The challenge in wanting limitations is constructing a workable test that yields those limitations. And if the test is simply "is it too attenuated?" who decides—the legislature or the judiciary? A workable test would prevent the Court from acting as legislators—striking down a law because the Court feels the connection with interstate commerce is too far-fetched or attenuated. So, the Court uses tests. But the tests have proved highly manipulative. In fact, Congress rewrote the GFSZA after *Lopez*, inserting a "jurisdictional element" into the law by applying it to firearms that have "moved" through interstate commerce.[109] And the more important question about using a test is, whether it really accomplishes what needs to be done. We need Congress to be able to legislate properly when there is a national interest at stake. Not having found (and not for lack of trying) a viable test in the nearly two centuries of Commerce Clause legislation and adjudication leaves us guessing—Do we need a test? And if so, how do we formulate one?

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[108] United States v. Lopez, 514 U.S. 549, 558–59 (1995).
[109] 18 U.S.C. § 922(q)(2)(A) (2012).

V. RESTORING § 13981 BY WAY OF *RAICH*

Lopez and *Morrison* had limited the scope of activity Congress could regulate via its commerce powers by enforcing the "essential" element of the revived Broader Regulatory Scheme Doctrine, confining regulation to purely economic activity and retreating from the oft-used rational basis test.[110] The *Raich* Court, without overturning *Lopez* and *Morrison*, diverged from this analysis to allow Congress to regulate homegrown, medicinal marijuana in California.[111] By utilizing the Broader Regulatory Scheme Doctrine in conjunction with the very deferential rational basis test, and by downplaying any economic/noneconomic considerations of the activity in question, *Raich* created a new framework from which to redraft legislation that would afford federal civil recourse for certain victims of GBV.[112]

A. Broader Regulatory Scheme Doctrine

Raich held that the CSA was "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[113] This decision suggests that Congress has unlimited power to regulate intrastate activity as long as it does so within an ambitious, far-reaching federal regulation.

Justice O'Connor's dissent in *Raich* vigorously chastised the majority for turning the *Morrison/Lopez* line of cases into a "drafting guide" for Commerce Clause legislation.[114] Having objected strongly to the use of the broader CDAPCA to justify the enforcement of its CSA sub-component, she wrote: "Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential . . . to the interstate regulatory scheme."[115]

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[110] *See Lopez*, 514 U.S. at 561; United States v. Morrison, 529 U.S. 610–13 (2000); *Morrison*, 529 U.S. at 634, 637 (Souter, J., dissenting); *Morrison*, 529 U.S. at 665 (Breyer, J., dissenting).

[111] *See Raich*, 545 U.S. 1 (2005).

[112] *See id.* at 22.

[113] *See id.* at 26–27 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

[114] *See id.* at 42–57 (O'Connor, J., dissenting).

[115] *Id.* at 46.

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Of course there are advocates and scholars that insist § 13981 *was* an essential part of a larger, federal regulation—that the VAWA was as comprehensive in its approach to fighting GBV as the CSA was with respect to drugs.[116] Certain precedent, to some extent, supports this. The Second Circuit described the VAWA as "a comprehensive statute designed to provide women nationwide greater protection and recourse against violence and to impose accountability on abusers."[117] The Fourth Circuit, in the decision that preceded *Morrison*, referred to the VAWA as a "comprehensive federal statute designed to address 'the escalating problem of violent crime against women.'"[118] Justice Breyer offers further, yet indirect support, for considering § 13981 an essential component of the VAWA by exposing the ill-defined nature of regulatory schemes. In *Morrison* he argued that the determination of whether or not a provision is a component of a larger regulation risks being arbitrary, proposing that Congress can "save [§ 13981] by including it, or much of it, in a broader 'Safe Transport' or 'Workplace Safety' act."[119] Arguably then, the statute struck down in *Lopez* could have been linked to Congress' regulation of firearms as well as to federal resources earmarked for education. Similarly, § 13981 could have been linked to a comprehensive effort to protect women from discrimination in education and employment.

The holding of *United States v. Maxwell* (2006) is illustrative of how *Raich*'s Broader Regulatory Scheme Doctrine has changed the landscape of Commerce Clause jurisprudence.[120] In *Maxwell*, the Eleventh Circuit, in a remand from the Supreme Court in light of *Raich*, held that application of the federal Child Pornography Prevention Act provisions criminalizing the

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[116] Chip Venie, *Federalism and Federalist Analysis of* Raich *Decision, Medical Marijuana is Dead?*, JUSTICE FOR ALL BLOG (June 25, 2005, 11:12 AM), http://crimelaw.blogspot.com/2005/06/federalism-and-federalist-analysis-of.html; *see* Scott Lemieux, Gonzalez v. Raich, LAWYERS, GUNS & MONEY BLOG (June 8, 2005), http://www.lawyersgunsmoneyblog.com/2005/06/gonzales-v-raich; Brief of Senator Joseph R. Biden, Jr. as Amicus Curiae in Support of Petitioners at 3, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1072538.; Sara E. Kropf, *The Failure of* United States v. Lopez*: Analyzing the Violence Against Women Act*, 8 S. CAL. REV. L & WOMEN'S STUD. 373, 389–90 (1999).

[117] United States v. Casciano, 124 F.3d 106, 110 (2d Cir. 1997).

[118] Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 962–63 (4th Cir. 1997), *vacated en banc*, 169 F.3d 820 (4th Cir. 1999) (quoting S. REP. NO. 10-138 at 37 (1993)).

[119] *See* United States v. Morrison, 529 U.S. 598, 656–57 (2000) (Breyer, J., dissenting).

[120] United States v. Maxwell, 446 F.3d 1210 (11th Cir. 2006).

production and possession of child pornography to the intrastate possession of child pornography did not violate the Commerce Clause.[121] The court determined that the lack of a jurisdictional element could be disregarded if an activity fell under *Raich*.[122] No longer needing a jurisdictional element, the broader regulatory scheme framework from *Raich* appears to be the dominating litmus test for Commerce Clause adjudication.

A promising use of the *Raich* theory for restoring federal civil recourse to certain victims of GBV is to connect a civil remedy (a "mini § 13981") to a federal regulation of violence connected with the workplace, travel, public accommodations or a place of business. For example, the recognition of sexual assault as prohibited sexual harassment under federal employment law provides an opportunity to link a mini § 13981, using *Raich* as a "drafting guide," to federal laws prohibiting job discrimination such as Title VII of the Civil Rights Act, Americans with Disabilities Act or Age Discrimination in Employment Act. These laws prohibit the discriminatory practice of "harassment on the basis of race, color, religion, sex, national origin, disability, genetic information, or age."[123] A civil remedy in this context would certainly reach some victims of GBV. Over seventy-two million women work outside the home in the United States, comprising almost half of workers in all occupations.[124] Statistics from 2014 reveal that GBV in the workplace mostly affects women: "Worldwide, 35 percent of women experience direct violence, and 40 to 50 percent experience workplace sexual harassment."[125]

Whether the harassment/assault is perpetrated by a supervisor and brought under a Title VII hostile work environment claim (employers are subject to vicarious liability for unlawful harassment by supervisors) or by a co-worker, customer or client, in which case the employer is sued under a negligence theory, an employer is liable for harassment of its employees if

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[121] *See id.* at 1219.

[122] *See id.* at 1218–19.

[123] U.S. Equal Emp't Opportunity Comm'n, *Federal Laws Prohibiting Job Discrimination Questions and Answers*, http://www.eeoc.gov/facts/qanda.html (last updated Nov. 21, 2009).

[124] U.S. Equal Emp't Opportunity Comm'n, *Preventing and Addressing Workplace Harassment*, www1.eeoc.gov/eeoc/meetings/1-14-15/graves.cfm?renderforprint=1 (last visited Sept. 25, 2015).

[125] Press Release, Comm. on Educ. & the Workforce, *House Dems Urge U.S. Businesses to Combat Gender-Based Violence in the Workplace* (Oct. 23, 2014), http://democrats.edworkforce.house.gov/press-release/house-dems-urge-us-businesses-combat-gender-based-violence-workplace.

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the employer was negligent in addressing the harassment.[126] What is problematic, however, on both the state and federal level, is that a great many of these lawsuits sue third-party defendants—employers with "deep pockets."[127] For example, a plaintiff may bring a negligence claim against a nursing facility that does not screen new hires for a criminal background or a shopping mall patrolled by callous security guards.[128] Without these "deep pockets" to pay for a plaintiff's attorneys' fees, lawyers frequently turn down these types of cases even if the plaintiff is likely to prevail.[129]

But *Raich* has given Congress the tools necessary to make a perpetrator of GBV personally responsible to the victim. Congress can simply attach a provision for civil redress to broader federal legislation regulating employment law or attach it to a new regulatory scheme. Because an activity no longer has to be an "economic" activity for Congress to regulate it under its commerce powers, Congress need only have a rational basis for why regulation of intrastate GBV is "essential" to a broader regulatory scheme.

Section 2261 of the Federal Crimes Code also could potentially accommodate a mini § 13981. Section 2261 prohibits:

> a person who travels in interstate or foreign commerce . . . with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, [to] commit[] or attempt[] to commit a crime of violence against that spouse, intimate partner, or dating partner.[130]

Section 2261 also prohibits a person from causing a spouse or intimate or dating partner "to travel in interstate or foreign commerce . . . by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse [or partner]."[131] Without much imagination, § 2261 could include a rape committed by someone who traveled in

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[126] Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013).

[127] *See* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 57, 96–97 (2006).

[128] *See, e.g.*, L.A.C. *ex rel.* D.C. v. Ward Parkway Shopping Ctr. Co., L.P. 75 S.W.3d 247 (Mo. 2002); Kladstrup v. Westfall Health Care Ctr., Inc., 701 N.Y.S.2d 808 (Sup. Ct. 1999).

[129] *See* Bublick, *supra* note 127, at 77.

[130] 18 U.S.C. § 2261(a)(1) (2015).

[131] 18 U.S.C. § 2261(a)(2) (2015).

interstate commerce for that purpose, if the rape intimidated or injured the victim "in the course of" or "as a result of" the travel.

Also, attaching a federal civil remedy to Title IX of the Education Amendments of 1972, which prohibits sexual harassment in public education programs and activities that receive federal financial assistance conceivably could pass precedential muster under *Raich*.[132] A mini § 13981 here would be especially helpful for someone if, despite an educational institution being in full compliance with Title IX, he or she becomes a victim of on-campus GBV. The victim can hold the perpetrator personally responsible through a federal civil private right of action.

B. Economic Nature of the Intrastate Activity

Like the dissenters in *Raich*, many scholars argue that the *Raich* Court broadened the definition of "economic" to the extent that Commerce Clause legislation can reach virtually all intrastate activity.[133] If true, VAWA advocates do not have to worry about whether GBV is considered an economic or noneconomic activity since regulating a noneconomic, intrastate activity via the Broader Regulatory Scheme Doctrine shields that activity from an economic versus noneconomic activity analysis.

C. Rational Basis Analysis

The *Raich* Court, according a high level of deference to Congress, held that regulation of the intrastate activity at issue was "essential" to a broader regulatory scheme.[134] How does the Court determine whether the regulated activity in a given case is an essential part of a larger regulation? The holding in *Raich* suggests that the Court simply read Congress' findings. The *Raich* Court examined the findings associated with enactment of the CSA, findings asserting that the regulation of intrastate marijuana

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[132] 20 U.S.C. § 1681(a)(1)–(9) (1972).

[133] *See, e.g.*, Gary R. Rom, *RLUIPA and Prisoner's Rights: Vindicating Liberty of Conscience for the Condemned by Targeting a State's Bottom Line*, 44 VAL. U. L. REV. 283, 319 (2009); Ilya Somin, Gonzales v. Raich *and the Individual Mandate*, VOLOKH CONSPIRACY (July 29, 2015, 2:31 PM), volokh.com/2010/10/05/Gonzales-v-raich-and-the-individual-mandate/.

[134] Gonzales v. Raich, 545 U.S. 1, 24–30 (2005).

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possession was "essential" to regulating interstate marijuana possession.[135] In short, the Court took Congress' word for it. This opens the possibility that the government is not required to actually prove that a mini § 13981 regulates "economic activity" or that it is an "essential" part of a broader regulation. Rather, the government can win by showing that Congress might have had some "rational" reason for believing that one of these two conclusions is correct.

In statutes preceding *Raich*, Congress may have drafted poorly by regulating a purely intrastate, noneconomic activity. However, these older statutes could be saved since it is of no consequence whether Congress enacts a certain provision separately rather than being enacted as part of a larger regulatory scheme. Certainly Congress can incrementally add legislation addressing a particular intrastate noneconomic activity to an existing regulatory scheme. Congress simply must show it had a rational basis for deeming the additional legislation "essential" to that regulatory scheme. The holding in *Raich* is essentially a rule that affords Congress the ability to enact regulations that would be unconstitutional if isolated by incorporating them into a larger regulatory scheme. Perhaps, depending on how creative Congress can be while using *Raich*'s "drafting guide," other possibilities will be revealed that will give to as many GBV victims as possible the very meaningful choice of civilly suing their perpetrator in the federal court system.

VI. CONCLUSION

The Supreme Court's reasoning in *Raich* and other notable Commerce Clause jurisprudence, along with the Court finding it unnecessary to overturn seemingly conflicting precedent, has created new doctrine that appears to allow for the redrafting of laws like § 13981 for satisfying the commerce argument. Fifteen years post *Morrison*, as Commerce Clause precedent has developed, and as we might suspect from the history of Commerce Clause jurisprudence, it is not at all a stable body of doctrine. As it stands, there are means to exploit this instability by carving § 13981

[135] *Id.* at 20–21.

into different settings that can be tied to some broader economic regulation and making a case for it working under the Commerce Clause.

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