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*In enacting the VAWA, Congress recognized the degree to which our nation's systems of law enforcement and adjudication have been complicit in perpetuating the epidemic of violence against women.*

I. Introduction

This statement, taken from a Tenth Circuit case allowing female victims to state a cause of action under the Gender Motivated Violence Act (GMVA), expresses Congress's crucial realization that state courts needed assistance in combating violence against women. The victims in this Tenth Circuit case celebrated a victory; however, their victory was short lived. A recent Supreme Court decision, *United States v. Morrison*, struck down the GMVA as an unconstitutional exercise of congressional Commerce Clause power. Thus, the Tenth Circuit case above, as well as others like it, will be overturned and the female victims will remain without vindication. The Tenth Circuit case provides an example of the effect that *Morrison*, the subject of this note, will have not only on the GMVA, but also on different types of future legislation. The *Morrison* decision severely limits Congress's ability to regulate areas such as civil rights and the environment under its commerce power. It also indicates a reversion to unsuccessful, antiquated, pre-New Deal Commerce Clause jurisprudence.

In analyzing *Morrison* and its repercussions, this note addresses the following topics: Part II provides a brief history of Supreme Court Commerce Clause

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1. McCann v. Rosquist, 185 F.3d 1113, 1120 (10th Cir. 1999).
2. Id. (reversing the district court's decision that the plaintiffs did not state a cause of action under the GMVA and remanding to district court).
5. In an unpublished opinion, the Tenth Circuit eventually affirmed the district court's original dismissal of the action based on the Supreme Court's invalidation of the GMVA. McCann v. Rosquist, No. 98-4049, 2001 WL 686787, at *1 (10th Cir. June 19, 2001).
jurisprudence, brief because the Court's 1995 decision in *United States v. Lopez*6 spawned numerous articles on the commerce power.7 Part III provides extensive background on *Morrison*, including a statement of the facts, a summary of the lower court decisions, and an explanation of the majority and dissenting positions. Part IV articulates four major flaws in the *Morrison* majority opinion: (1) purporting to adhere to rationality review, while applying a stricter form of scrutiny; (2) refusing to acknowledge the purpose of the GMVA as protecting civil rights; (3) viewing the GMVA as an infringement on states' rights; and (4) failing to sufficiently consider Section 5 of the Fourteenth Amendment as a basis for the GMVA.

Part V discusses several types of statutes that have been and will continue to be challenged as a result of the *Morrison* decision. These include various federal possession statutes, the Hobbs Act, the Violent Crimes in Aid of Racketeering Act, the Federal Arbitration Act, the Child Support Recovery Act, the Fair Housing Administration Act, the Free Access to Clinic Entrances Act, and environmental regulations. Part V provides practitioners assistance in analyzing the constitutionality of statutes after *Morrison*, compiling several recent cases from various jurisdictions. At the same time, Part V illustrates that *Morrison* places several types of desirable legislation in jeopardy. Part VI concludes with an argument that *Lopez* and *Morrison* should be overruled, and the Court should return to pre-*Lopez* reasoning.

II. Supreme Court Decisions Leading to *Morrison*

A. Pre-*Lopez*: A Long Road of Legislative Deference

As the United States evolved from a community-oriented, agricultural economy to a national, industrialized economy, the Supreme Court granted Congress increased power to pass federal regulation under the Commerce Clause.8 Much of this federal regulation arose as New Deal legislation intended to strengthen and federalize the national economy.9 In a breakthrough case, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,10 the Supreme Court abandoned its former adherence to a "rigid model of tiered federalism and . . . instead [began] to focus on assessing the proper scope of Congress's ability to regulate an economy that was interrelated and national in nature."[11] In *Jones & Laughlin Steel*, the Court


8. The United States Constitution grants Congress the power "[t]o regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.


10. 301 U.S. 1 (1937).

overruled former decisions holding that regulation under the Commerce Clause must have a direct link to interstate commerce; instead, the Court held that Congress had the ability to regulate intrastate activities if these activities had "a close and substantial relation to interstate commerce."" This new test allowed Congress to pass legislation that would have formerly been viewed as purely local and beyond the reach of federal regulation.13

The test articulated in Jones & Laughlin Steel became known as the "substantial effects test" and remained the benchmark for deciding Commerce Clause issues for approximately sixty years.14 Under the substantial effects test, numerous congressional acts passed constitutional muster despite their indirect and arguably negligible effect on interstate commerce, thus proving the Court's grant of deference to Congress's exercise of its commerce power.15 Often cited as the high watermark of the substantial effects test and often used to demonstrate the wide range of commerce power over what may appear a purely local activity is the Court's decision in Wickard v. Filburn.16 In Wickard, the Supreme Court upheld the Agricultural Adjustment Act of 1938, a New Deal provision that allowed the Secretary of Agriculture to set quotas for raising wheat on all farms within the United States.17 A private farmer contested the statute, arguing that it was unconstitutional because it regulated a noneconomic, local activity — the home growing of wheat used solely for self-consumption.18 The Court rejected this argument and held that although the activity had only a trivial effect on interstate commerce when considered individually, it had a sufficiently substantial effect on interstate commerce when considered in the aggregate.19 Wickard developed a "cumulative effect principle" that further enlarged congressional power under the substantial effects test.20

The Court has applied the Wickard rationale and the substantial effects test not only to economic regulation, but also to civil rights legislation passed under the Commerce Clause.21 In Heart of Atlanta Motel, Inc. v. United States,22 the Court

12. See id. at 713-14 (emphasis added).
13. See id. at 714.
17. Id. at 113-15.
18. Id. at 119.
19. Id. at 127-29.
20. See Douglas, supra note 9, at 714.
upheld Title II of the Civil Rights Act of 1964, which prevented places of public accommodation from discriminating on the basis of race, color, national origin, or religion. In *Heart of Atlanta*, the Court acknowledged that the fundamental objective behind Title II was to vindicate the deprivation of personal dignity that accompanies inequality. Acknowledging this noneconomic objective, the Court recognized that such an objective could be readily achieved by congressional action based on Commerce Clause power. Significantly, the Court focused on the regulation's relation to the "national interest," and gave great deference to Congress: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints . . . . They are the restraints on which the people must often rely solely . . . ." The Court reasoned that Congress's regulatory power was not restricted simply because the particular obstruction to interstate commerce with which it dealt (discrimination) was deemed a moral and social wrong. The Court also considered the argument that Title II regulated purely local activity, but reasoned that the commerce power "includes the power to regulate the local incidents . . . which might have a substantial and harmful effect upon that commerce."

Because the statute at issue in *Morrison* stated its purpose as ending discriminatory violence against women (arguably making it a civil rights statute), the Court's rationale in *Heart of Atlanta* deserves particular attention. As will be explained in Part IV.B of this note, the *Morrison* majority ignored *Heart of Atlanta*'s rationale for upholding civil rights laws under the commerce power. Instead, the Court strictly followed *Lopez*, despite the fact that the GMVA had more in common with the Civil Rights Act at issue in *Heart of Atlanta* than the Gun Free School Zones Act at issue in *Lopez*.

**B. United States v. Lopez: A Screeching Halt**

In 1995, the Supreme Court handed down the landmark Commerce Clause decision of *United States v. Lopez*, which signaled a drastic departure from prior jurisprudence, reminded Congress that its regulatory powers were limited, and sparked mass debate in the legal community. In *Lopez*, the Court determined the

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23. Id. at 247.
24. Id. at 250.
25. Id.
26. Id. at 255 (emphasis added).
27. Id.
28. Id. at 257.
29. Id. at 258 (emphasis added). This is significant because the *Morrison* majority ignored this expansive, inclusive language when interpreting the GMVA. See infra Part IV.B.
30. See United States v. Morrison, 529 U.S. 598, 629 (2000); see also infra note 94 and accompanying text.
31. 514 U.S. 549 (1995). The *Lopez* court decided the case by a narrow margin. The opinion consisted of a tenuous three-Justice majority, supported by two concurring opinions, and opposed by a four-Justice dissent. Id.
32. See supra note 7 and accompanying text.

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constitutionality of the Gun Free School Zones Act (GFSZA), a statute making it a federal crime for "any individual knowingly to possess a firearm at a place that the individual knows . . . is a school zone." The Lopez Court delineated three categories of activity that Congress may regulate: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those activities that substantially affect interstate commerce. The Lopez and Morrison analyses apply to category-three legislation; category three stands on the most tenuous ground and will be the subject of most scholarly debate on this topic.

In scrutinizing category-three legislation, the Court posited four considerations relevant to determining whether a statute meets constitutional standards: (1) whether the regulated activity is commercial or noncommercial in nature; (2) whether the statute contains a jurisdictional nexus tying it to interstate commerce; (3) whether Congress made sufficient legislative findings to support a rational basis for concluding commerce would be substantially affected by the regulation; and (4) whether the link between the conduct and the effect on interstate commerce is attenuated. Although the Court did not expressly overrule precedent, by adding these four more restrictive and newly categorical considerations to a Commerce Clause analysis, the Court quietly but drastically changed the course of Commerce Clause jurisprudence. Finding that "[r]espondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie

34. Lopez, 514 U.S. at 558-59.
35. In Part V, this note examines controversial statutes that have been challenged after Morrison. Most courts categorized the controversial piece of legislation as category-three legislation, that which potentially has a substantial effect on interstate commerce. See infra Part V.
36. A "jurisdictional nexus" serves as a narrowing element within a statute that theoretically ensures, on a case-by-case basis, that the instance of regulated conduct had an effect on interstate commerce. See Lopez, 514 U.S. at 561. For example, to correct the GFSZA after the Lopez decision, Congress merely added a provision that the gun must have "moved in or . . . otherwise affect[ed] interstate or foreign commerce" and then noted the common movement of guns in interstate commerce. See Douglas, supra note 9, at 747 n.319. In addition, other portions of the VAWA that contain a jurisdictional nexus have been upheld. See, e.g., United States v. Lankford, 196 F.3d 563, 571-72 (5th Cir. 1999) (collecting cases that have upheld the portion of the VAWA prohibiting interstate domestic violence due to its jurisdictional nexus).

One author, arguing in favor of the GMVA's constitutionality, reasoned that "[t]he jurisdictional nexus is best interpreted as an alternative avenue to constitutionality rather than a requirement. That the civil rights provision of VAWA contains no such jurisdictional element, therefore, does not constitute a shortcoming." Kerrie E. Maloney, Note, Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez, 96 COLUM. L. REV. 1876, 1934 (1996). Further, Maloney argues that adding a jurisdictional nexus to the GMVA would be "highly impractical and counterproductive. Would the question be whether the perpetrator or the victim recently moved in interstate commerce? If so, the efficacy of the remedy would be undercut." Id. at 1935.
37. See Lopez, 514 U.S. at 559-63. These four considerations formed the basis of the majority opinion. But Justice Kennedy's concurring opinion, joined by Justice O'Connor, implied a reluctance to move away from anything stricter than a rational basis test: "Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance." Id. at 577 (Kennedy, J., concurring).
to interstate commerce, the Court struck down federal regulation under the Commerce Clause for the first time in sixty years.

The Lopez decision did not expressly overrule precedent such as Wickard and Heart of Atlanta, and Congress did not back the GFSZA with congressional findings linking the regulation to interstate commerce. Thus, the decision left legal scholars wondering whether the case would be an anomaly in the long line of commerce cases, a slap on the wrist reminding Congress to sufficiently link its regulation to interstate commerce with legislative findings, or a true turning point in Commerce Clause jurisprudence. While Morrison does not answer the deeper, underlying questions raised by Lopez and still does not explicitly announce a new test for Commerce Clause regulation, Morrison does make two points very clear. First, Lopez will not stand as an anomaly. Second, Lopez served as more than a reminder to Congress to provide ample evidence backing the regulation's link to interstate commerce. The Morrison opinion indicates that Lopez served as a warning that the Supreme Court would now be in the business of judicially scrutinizing the sufficiency, logic, and soundness of the evidence provided by Congress.

III. United States v. Morrison: A Turn in the Wrong Direction

A. Christy Brzonkala's Story

In May 2000, the Supreme Court handed down the long-awaited and much-debated follow-up case to Lopez, United States v. Morrison. Morrison arose from the following facts: Christy Brzonkala attended Virginia Polytechnic Institute and State University. On the third floor of her college dormitory, two university football players allegedly gang raped Christy after meeting her earlier in the evening. After the incident, the accused made derogatory statements about getting women drunk and having sex with them. Two months later, Christy filed a report against

38. Id. at 567.
39. Because the dissent in Morrison in many ways echoes the dissent in Lopez, the dissent's position in Lopez will be illuminated in Part IV of this note. For a further discussion of the dissent's position in Lopez, see Harsch, supra note 14, arguing that the Lopez majority endorsed an underinclusive test, that the Lopez dissent endorsed an overinclusive test, and offering his own four-prong test for Commerce Clause analysis.
40. The GFSZA did not require the gun to have traveled in interstate commerce. In addition, Congress did not make any findings linking guns in school to interstate commerce. See Douglas, supra note 9, at 717.
44. Specifically, the plaintiff introduced the following statement at trial as evidence of Morrison's
her two attackers with the university.45 After a committee hearing, the panel found Antonio Morrison guilty of sexual assault and suspended him for one year; the panel released the other attacker due to insufficient evidence. Morrison appealed this decision and the committee set aside Morrison's suspension, allowing him to return to campus the following semester. After learning of the panel's decision from a newspaper article,46 Christy decided not to return to school, fearing for her safety due to Morrison's return and the publicity engendered by her accusations. Later that year, Christy filed suit in federal court in Virginia, alleging violations of various state laws, Title IX of the Education Amendment Act, and the VAWA.47

B. Summary of Lower Court Decisions, with Focus on Vacated Fourth Circuit Opinion

Three relevant decisions came down in this case: the district court decision,48 a Fourth Circuit opinion,49 and a Fourth Circuit en banc rehearing opinion.50 The district court decision and en banc opinion struck down the statute as unconstitutional, while the Fourth Circuit's vacated decision upheld the statute. All three opinions reflect the underlying ideological split in the Supreme Court in both the Lopez and Morrison decisions. Because the en banc court's decision bears much similarity to the Supreme Court's majority opinion in Morrison51 (discussed in the next section), this portion of the note analyzes the original Fourth Circuit opinion.

gender animus: "I like to get girls drunk and fuck the shit out of them." See id. at 376. The vulgar and discriminatory statement by Morrison was crucial because the GMVA required that the violent act be motivated by gender animus. See Atkins et al., supra note 3 (offering practical advice on how to prosecute under the Violence Against Women Act and explaining the difficulty in proving the gender-motivated-animus element of the statute).

45. Brzonkala did not file criminal charges because, as in many rape cases, she had not preserved any physical evidence. See Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 954 (4th Cir. 1997).

46. The university did not notify Brzonkala of the appeal proceedings or the judgement set aside by the school. See Liuzzo, supra note 43, at 376.

47. Brzonkala never finished college and now works as a waitress. Throughout this ordeal, she overdosed on pills and became reclusive, according to her father. Asked about the outcome of her case (which, confusingly, ended up having nothing to do with what happened to her that night), Christy said: I fell in a big black hole, and this is where the rabbit ends up. It was disappointment after disappointment . . . . I cry whenever I think about how much I wish it would have been the other way, to have tangible evidence that we're making progress toward men and women being equal.

Brooke A. Masters, 'No Winners' in Rape Lawsuit; Two Students Forever Changed by Case That Went to Supreme Court, WASHINGTON POST, May 20, 2000, at B1.


51. For an in-depth prediction of and precursor to the Morrison decision, see Brzonkala III, a sixty-nine page opinion detailing the history of Commerce Clause jurisprudence and its relation to Lopez.
aundered by Judge Motz. Judge Motz's opinion illuminates and supports several arguments made in Part IV, arguing for the constitutionality of the GMVA.

The original Fourth Circuit opinion, vacated by the en banc opinion, upholds the statute, distinguishing Morrison from Lopez based on the voluminous congressional findings behind the GMVA in comparison to the absence of congressional findings behind the GFSZA. The court stated that it could "begin where the Lopez Court could not, by evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce."

The court held that it must defer to congressional findings when a rational basis exists for such findings. Applying this rational basis test (relying on language from Lopez), the court found a rational basis for Congress's conclusion that the GMVA substantially affected interstate commerce based on Congress's "exhaustive and meticulous investigation of the problem." Specifically, the court cited a Senate report stating the following:

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

In addition, the court cited cases from every judicial circuit that upheld post-Lopez Commerce Clause challenges using a rational basis test, as well as cases upholding the GMVA under Commerce Clause challenges.

Significantly, the court interpreted Lopez in the following way: "The Lopez court did not strike down [the GFSZA] because it regulated non-economic activity. The Court invalidated [the GFSZA] because neither Congress nor the Government convinced the Court that there was a rational basis for concluding that possession of a gun in a school zone substantially affected interstate commerce." In contrast, according to Judge Motz, Congress's legislative findings that women's decreased workplace productivity and decreased interstate travel substantially affected interstate commerce must convince the court of a rational basis behind the GMVA.

This opinion demonstrates the difficult task that Lopez (and now Morrison) demands: courts must attempt to apply the rational basis test of old, while at the same time adhere to the stricter, more categorical approach mandated by Lopez and

52. See Brzonkala II, 132 F.3d at 965.
53. Id. (alteration in original) (quoting United States v. Lopez, 514 U.S. 549, 563 (1995)).
54. Id. at 966 (quoting Hodel v. Va. Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981)).
55. Id. at 967.
56. Id. (quoting S. REP. NO. 102-197, at 38 (1991)).
57. Id. at 968 n.11. For a Tenth Circuit case applying a post-Lopez rational basis analysis, see United States v. Hampshire, 95 F.3d 999, 1001 (10th Cir. 1996).
58. Brzonkala II, 132 F.3d at 968. Two cases — Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), and Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) — provide the most illustrative examples of cases upholding the GMVA.
59. Brzonkala II, 132 F.3d at 972.

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Morrison. However, these two approaches cannot coexist to form a workable Commerce Clause standard. Legimately and probably somewhat hopefully, Judge Motz interpreted Lopez as a judicial slap on the wrist to force Congress to better explain the law's tie to interstate commerce, rather than a brand new form of Commerce Clause jurisprudence. Based on the Supreme Court's decision in Morrison, Judge Motz interpreted Lopez incorrectly.

C. The Morrison Majority

Some scholars correctly predicted, based on the Court's decision in Lopez, that the Supreme Court would strike down the GMVA as an unconstitutional exertion of Commerce Clause power. By invaliding the GMVA, the Court not only solidified the importance of Lopez as a turning point in Commerce Clause jurisprudence, but also extended the reach and rationale of the Lopez decision to statutes sufficiently supported by congressional findings. Writing for a stronger five-Justice majority than in Lopez, Chief Justice Rehnquist tracked the three categories of activity that Congress may regulate under the Commerce Clause, and categorized the VAWA as category-three legislation, that which has a substantial effect on interstate commerce. The Court then proceeded with a Lopez analysis, describing Lopez as the most recent clarification of category-three regulation.

First, the Court emphasized that "he noneconomic, criminal nature of the conduct at issue" in Lopez "was central to [its] decision in that case," and concluded that gender-motivated crimes of violence do not qualify as economic activity. The Court purported to refuse to adopt a "categorical rule against aggregating the effects of a noneconomic activity," but did emphasize that intrastate Commerce Clause regulation had only been upheld when that activity was economic in nature. (In effect, Morrison does seem to adopt a categorical rule against aggregating the effects of a noneconomic activity.) Second, the Court noted the lack of a


61. Lopez, also a 5-4 split, had a Kennedy-O'Connor concurrence expressing doubts regarding content-based limits on the Commerce Clause power. See United States v. Lopez, 514 U.S. 549, 568-83 (1995). Morrison had only a short, one-Justice concurrence by Justice Thomas, thus indicating Justice Kennedy's and Justice O'Connor's more solid agreement with the Morrison analysis. See United States v. Morrison, 529 U.S. 598, 627 (2000). Notably, Justice Thomas would have extended Lopez a step further and explicitly overruled the substantial effects test. See id.

62. Petitioners did not contend that the GMVA fell within either of the first two categories of Commerce Clause regulation. See Morrison, 529 U.S. at 609. However, at least one article makes the argument that the GMVA could also be categorized as category-two regulation, a regulation of "the instrumentalities of interstate commerce, or persons or things in interstate commerce." Maloney, supra note 36, at 1935-39 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

63. Morrison, 529 U.S. at 609. Although the Court labeled Lopez as a "clarification" of the substantial effects analysis, Lopez arguably departed from, rather than clarified, established precedent on category-three regulation.

64. Id. at 610.

65. Id. at 613.

66. Id.
jurisdictional element in the GMVA and reasoned that a jurisdictional element may have saved the statute. 67 Third, and perhaps most significantly, the Court dismissed the numerous congressional findings as unpersuasive because the findings relied on the type of weak, but-for causal reasoning that Lopez explicitly rejected. 68 In other words, the link between the occurrence of the crime and the effects on interstate commerce was too attenuated. The Court also reiterated its fear that Congress may begin regulating any crime, as long as the nationwide, aggregated impact of that crime had substantial effects on employment, production, transit, or consumption. 69 The Court also feared federal infringement on family law and other traditional areas of state regulation. 70 Concluding, the Court rejected the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce, and held that the Constitution required a distinction between what is "truly national" and what is "truly local." 71

D. The Morrison Dissent

Four Justices dissented in Morrison. 72 The dissent began by stating, "The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact." 73 First, the dissent explained why the GMVA should be upheld, using Lopez as controlling precedent. Like Judge Motz, the dissent distinguished Lopez from Morrison based on the "mountain of data" assembled by Congress before passing the GMVA. 74 The dissent then pointed to cases such as Heart of Atlanta 75 and Katzenbach v. McClung 76 in which the Court upheld similar legislation based on much less congressional evidence. 77 The dissent also recognized that gender-based

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67. Id. The Court noted that Congress elected to cast the GMVA's remedy "over a wider, and more purely intrastate, body of crime." Id. The Court ignored the fact that adding a jurisdictional nexus would render this type of statute virtually useless. See Maloney, supra note 36, at 1935 (arguing that such an element would be highly impractical and counterproductive to the purposes of the GMVA).


69. Id. at 615.

70. Id. at 615-16.

71. Id. at 617-18. The majority also rejected passage of the statute under the Fourteenth Amendment because the GMVA did not directly apply to state actors. Id. at 626-27. The dissent does not reach this issue because of its finding of constitutionality under the Commerce Clause. The Fourteenth Amendment's application to the GMVA and other statutes will be discussed in Part IV.D of this note.

72. Justice Souter filed a dissenting opinion, in which Justices Stevens, Ginsburg, and Breyer joined. Id. at 628-55. Justice Breyer also filed a dissenting opinion, with whom Justice Stevens joined, and with whom Justice Souter and Justice Ginsburg joined as to Part I-A. Id. at 655-66.

73. Id. at 628 (Souter, J., dissenting) (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981)).

74. Id. Significantly, Congress passed the VAWA before the Lopez decision and yet made detailed findings regarding the effects on interstate commerce.


77. Morrison, 529 U.S. at 635 (Souter, J., dissenting). In Heart of Atlanta, the Court upheld the statute despite its lack of congressional findings tying the regulation to interstate commerce. Heart of Atlanta, 379 U.S. at 252.
violence in the 1990s operated similarly to racial discrimination in the 1960s in reducing the mobility of employees and their consumption of goods in interstate commerce. Like racial discrimination, the dissent reasoned, gender-based violence bars its most likely targets from full participation in the national economy.\textsuperscript{78}

Second, the dissent explained that the new Commerce Clause test pronounced in \textit{Lopez} and now affirmed in \textit{Morrison} cannot be reconciled with precedent: it grants Congress less than plenary power and represents a resurgence of the disastrous pre-New Deal approach of categorical limitation to Commerce Clause analysis.\textsuperscript{79} The dissent also criticized the majority for failing to utilize the benefit of hindsight, for failing to acknowledge the "near-tragedy" that stemmed from distinguishing in terms of commercial and noncommercial activity for purposes of Commerce Clause jurisprudence.\textsuperscript{80} Applying \textit{Wickard}, the dissent reasoned,

\begin{quote}
[I]f substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the \textit{causes} of those effects are themselves commercial? The Court's answer is that it makes a difference to federalism, and the Court's new \textit{judicially derived federalism} is the crux of our disagreement.\textsuperscript{81}
\end{quote}

This statement by the dissent labels the majority's brand of federalism as judicially created rather than constitutionally mandated. In many ways, this statement sums up the ideological Commerce Clause debate that currently splits the Court.

IV. Analysis: The Majority Steered Wrong in Four Ways

A. The Majority Did Not Take a Stand Between the Rational Basis Test and the Higher Level of Judicial Scrutiny Established in Lopez

The majority purports to rely on pre-\textit{Lopez} case law and pays "lip service" to the rational basis test as a standard for scrutinizing Commerce Clause legislation, while at the same time applying an obviously higher standard of review. Comparing language in \textit{Morrison} with pre-\textit{Lopez} precedent such as \textit{Wickard} and \textit{Heart of Atlanta}, \textit{Morrison} clearly applied a standard other than rational basis review. Because the GFSZA had no legislative findings and did not even mention commerce,\textsuperscript{82} the Court in \textit{Lopez} more legitimately may have been adhering to rationality review, and yet failing to find a rational basis.\textsuperscript{83} In contrast, Congress

\begin{itemize}
\item \textsuperscript{78} See \textit{Morrison}, 529 U.S. at 636 (Souter, J., dissenting) (citing S. REP. NO 103-138, at 54 (1993)).
\item \textsuperscript{79} Id. at 640-41 (Souter, J., dissenting).
\item \textsuperscript{80} Id. at 641-42 (Souter, J., dissenting). The dissent reasoned:
\begin{quote}
Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before \textit{Jones \& Laughlin Steel}, which brought the earlier and nearly disastrous experiment to an end.
\end{quote}
\item \textsuperscript{81} Id. at 642-43 (Souter, J., dissenting).
\item \textsuperscript{82} Id. at 643 n.13 (Souter, J., dissenting) (emphasis added).
\item \textsuperscript{83} See United States v. Lopez, 514 U.S. 549, 562 (1995) (explaining that the government conceded that the GFSZA did not contain congressional findings regarding its effects on interstate commerce).
\end{itemize}
backed the GMVA with numerous legislative findings regarding gender-motivated violence's effect on commerce. For example, the reports concluded that gender-motivated violence deterred potential victims from traveling out of state, from engaging in employment in interstate business, and from transacting business in interstate commerce. The majority's refusal to accept the legitimacy and/or sufficiency of this data indicates that the Court employed a truly higher level of scrutiny. As the dissent articulated, the GMVA would have passed if it would have come before the Court between Wickard in 1942 and Lopez in 1995. During this time, the Court declined to limit the commerce power through a formalistic distinction between legislation specifically addressing "commerce" and statutes addressing "moral" wrongs. In Morrison, the Court distinguished the GMVA from precedent by labeling it noneconomic; however, pre-Lopez case law simply does not draw this type of distinction. As stated by the dissent, the Court used an analysis "of a rather different sort, dependent upon a uniquely judicial competence" and scrutinizing more than the "rationality of the congressional conclusion."

Lopez and Morrison reached incorrect conclusions and started down the wrong path using this stricter form of rational basis in analyzing whether a statute has a substantial effect on commerce. Based on precedent and historical Supreme Court blunders in failing to grant Congress plenary power in this area, the Supreme Court must limit its review to rationality and leave resolutions such as this to "Congress under its more flexible and responsible legislative process."

Not only does the Morrison court reach an incorrect conclusion, but it sets an unworkable, unclear standard that will lead to ad hoc determinations of one of the most important federal judicial issues. Further, Morrison discounts one of the

on precedent despite its lack of legislative findings. Prior to Lopez, the Court did not require legislative findings and did not consider them a crucial consideration. See Heart of Atlanta, Inc. v. United States, 379 U.S. 241, 252 (1964) (upholding a law backed by only anecdotal evidence of effect on commerce).

84. See Morrison, 529 U.S. at 634 (Souter, J., dissenting).

85. Lopez implied, misleadingly, that sufficient legislative findings may save future statutes. See Lopez, 514 U.S. at 562 (explaining that "congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye").

The Morrison dissent conceded that most of the data compiled by Congress related to the effects of violence against women generally, while the civil rights remedy limited its scope to gender-motivated crimes. See Morrison, 529 U.S. at 629 n.2 (Souter, J., dissenting). Thus, the GMVA arguably proscribed a narrower subset of acts than those specifically addressed by the findings. However, the dissent argued that much of the data referred to criminal conduct with just such gender motivation. Id. "In any event," the dissent stated, "adopting a cramped reading of the statutory text, and thereby increasing the constitutional difficulties, would directly contradict one of the most basic canons of statutory interpretation." Id.

86. Id. at 637 (Souter, J., dissenting).

87. See id.

88. Id. at 638 (Souter, J., dissenting). The dissent went on to say, "This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of Lopez aside), least of all those the majority cites." Id.

89. See id. at 629 n.2 (Souter, J., dissenting).


91. "Admittedly, a determination whether an intrastate activity is commercial or noncommercial may
four "considerations" in *Lopez* that could potentially save a statute with a questionable effect on interstate commerce: congressional findings. If that "consideration" did not apply to the GMVA, it will likely not apply to many other statutes. 92 *Morrison* seems to prove that the Court will no longer show deference to congressional conclusions, even conclusion supported by data tying the activity to interstate commerce, but will instead look at the activity from its own judicial standpoint and determine whether the conduct being regulated is sufficiently "economic" in nature.

To decide whether the Court used something stricter than a rational basis standard, one can ask the question posed by the dissent: given the congressional findings and the stated purpose of the law, did Congress make a completely *irrational* decision in deciding that gender-motivated violence affected commerce? The Court's refusal to overrule precedent reveals the Court's wariness to abandon rational basis review. But by refusing to articulate a stricter test, the Court created a judicially pliable standard, one that gives the courts flexibility, but leaves Congress — the lawmaking body — in a straightjacket. Put simply, the Court created bad law.

**B. The Majority Misapplied Heart of Atlanta and Created a Detrimental Distinction Between the Civil Rights Act and the GMVA**

In order to state a cause of action under the GMVA, a victim had to prove not only that the accused committed an act of violence, but also that the violence was specifically motivated by the victim's gender. 93 The "purpose" clause of the GMVA stated that the objective of the statute was to "protect the civil rights of victims of gender-motivated violence." 94 This noneconomic objective should be compared to the noneconomic objective of ending racial discrimination in *Heart of Atlanta* and

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92. The dissent stated: Passage of the Act was preceded by four years of hearings, which included testimony from [physicians, law professors, rape survivors, and others]. The record includes reports on gender bias from task forces in 21 states, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress . . . over the long course leading to enactment. *Morrison*, 529 U.S. 629-31 (Souter, J., dissenting) (footnotes omitted).

93. 42 U.S.C. § 13981(d)(1) (1994). The section defines "crime of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* For a general discussion of what was required to prove a cause of action under the GMVA, see Atkins et al., *supra* note 3.

94. 42 U.S.C. § 13981(a) (1994). A statement by one member of Congress proves that Congress passed the act not to regulate criminal law, but to protect civil rights as it had done in other arenas: The [GMVA] aims to put gender-motivated bias crimes on the same footing as other bias crimes. Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims of this violence are reduced to symbols of group hatred; they are chosen not because of who they are as individuals but because of their class status. *Douglas*, *supra* note 9, at 708 (quoting a Senate report).
McClung. In both cases, Congress had authority to apply the law to privately owned entities based on the aggregate effect the discrimination had on interstate commerce.

The Court attempted to distinguish Heart of Atlanta and McClung from Lopez and Morrison because the statute at issue in the earlier cases regulated hotels and restaurants, both thought of as "economic" establishments. However, this distinction is arbitrary and detrimental to future civil rights legislation, especially in light of the Civil Rights Act's underlying focus. The Civil Rights Act aims to curb racial discrimination (a private, noneconomic activity). The Court upheld the Civil Rights Act based on the effect racial discrimination had on interstate commerce when considered in the aggregate. Similarly, the GMVA targeted gender-motivated violence (a private, noneconomic activity). Congress based its law on the substantial effect that gender-motivated violence, as an activity, had on interstate travel, commerce, and the workplace. The crucial question should not be whether the type of entity affected by the regulation (a hotel or an individual person) has a substantial effect on interstate commerce, but whether the activity being regulated has a substantial effect on interstate commerce. When Congress finds that an activity has a substantial effect on interstate commerce, it should be irrelevant who will potentially feel the blow of the regulation (an economic or noneconomic entity). Put differently, a finding that gender-motivated violence is not "commerce" does not dispose of the question of whether gender-motivated violence has a substantial effect on commerce.

This unwillingness to follow Heart of Atlanta, despite the GMVA's clearly stated purpose of regulating to protect the civil rights of women, could mean two things. First, it could reaffirm that the Court only purported to follow precedent, but actually followed a stricter standard than the one set out in Lopez. Second, it could mean that the Court did not truly accept the GMVA as "civil rights" legislation, but instead viewed the statute as purely criminal legislation. The majority did, in fact, state its holding as, "We accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." This holding, however, misstated the activity Congress sought to regulate. The fact that the civil rights provision provided a remedy to vindicate criminal conduct should not automatically lead to a conclusion that the provision regulated state criminal law. The statute did not criminalize all acts of violence toward women, but limited its scope to providing a federal civil

95. The GMVA did not extend to all random acts of violence, but required the act to be motivated by gender. See id.

96. Pointing out this flaw in the majority's opinion, Justice Breyer posed the question: "[C]an Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation?" Morrison, 529 U.S. at 657 (Breyer, J., dissenting). For a similar argument, see Douglas, supra note 9, at 747.

97. For a short summary of this argument, see Peter M. Shane, In Whose Best Interest? Not the States', WASH. POST, May 21, 2000, at B5.

98. Morrison, 529 U.S. at 617 (emphasis added).

99. For a similar argument made in response to the Brzonkala II decision, see Maloney, supra note 36, at 1928.
remedy for violent conduct toward women specifically motivated by gender.\textsuperscript{100} This limitation indicated Congress's intent to regulate federal civil rights, rather than infringe on state criminal law. Notably, the "motivated by gender" requirement in the statute proved a difficult hurdle for victims to overcome in court.\textsuperscript{101} Although it may seem that all violence toward women is motivated by some type of gender animus, courts typically required very specific evidence of this gender animus, such as verbal expressions of hatred while committing the crime.\textsuperscript{102} In other words, plaintiffs could not prove this element simply by showing that violence occurred and occurred against a woman.\textsuperscript{103}

Because the majority in \textit{Morrison} placed large emphasis on the distinction between "truly national" and "truly local" realms, viewing the GMVA as civil rights legislation may have saved the statute. Civil rights legislation, unlike criminal law, has been an area traditionally left to federal regulation.\textsuperscript{104} Like the Civil Rights Act of 1964, the GMVA reflected a conscious, deliberate, and well-reasoned congressional conclusion that gender-motivated violence placed women's civil rights in jeopardy. In addition, the GMVA sought to protect the "national interest," that is, to make a statement that the federal government would not tolerate this type of violence against women. The Court's refusal in \textit{Morrison} to rely on \textit{Heart of Atlanta} as a guide to civil rights statutes passed under the Commerce Clause, combined with the Court's refusal to acknowledge the civil rights objective of the statute, combined with the new economic/noneconomic distinction, may leave civil rights legislation aimed at curbing discrimination by individual actors tragically out of reach of Commerce Clause power.

\textbf{C. The GMVA Did Not Infringe upon States' Rights}

The Court in \textit{Morrison} observed that "[the government's] reasoning, moreover, will not limit Congress to regulating violence, but may . . . be applied equally . . .

\textsuperscript{100} To state a cause of action for a civil remedy under the GMVA, the victim did not have to prove a prior criminal conviction. If found liable, the accused faced no criminal penalty that superseded or took the place of state criminal law. \textit{See Atkins et al., supra} note 3, at 74.

\textsuperscript{101} Practitioners applying the VAWA observed the following:

\begin{itemize}
  \item The second prong of a successful VAWA claim requires proof that the crime was not merely a random act of violence, but rather was committed because of the victim's gender. While some crimes on the surface appear to demonstrate gender-based animus (e.g. rape and other sexual assaults), federal courts have disagreed on whether such crimes require an additional showing of gender-motivated animus . . . .
  \item [I]t is difficult to show that the defendant acted misogynistically without a smoking gun, such as violence accompanied by sexist epithets or rape.
\end{itemize}
\textit{Id. at} 75 (footnote omitted).

\textsuperscript{102} \textit{See id.}

\textsuperscript{103} \textit{See id. at} 72 (explaining that although it took a step in the right direction, the VAWA was not wholly effective in combating domestic violence because violence committed against an intimate partner is seldom a meaningless, random event accompanied by obvious gender animus).

\textsuperscript{104} \textit{See Maloney, supra} note 36, at 1927-28. "Section 13981 does not regulate 'local criminal activity,' but rather the discriminatory animus that motivates certain local criminal activity." \textit{Id. at} 1928 (footnote omitted).
[to] marriage, divorce, and childbearing."\textsuperscript{105} This statement reflects the Court's concern that if the federal government begins to regulate rape and domestic violence laws, the government will be able to regulate an unlimited amount of other areas traditionally left to the states. This concern is unfounded for three reasons. First, as explained in the previous paragraph, the Court narrowly construed the statute as solely attempting to regulate violent criminal conduct, ignoring the statute's attempt to end the underlying discrimination that \textit{caused} this violent criminal conduct. When viewed in this manner, the GMVA does not infringe on an area traditionally left to states, but instead regulates an area that has historically been the province of the federal government.\textsuperscript{106}

Second, this fear that allowing Congress regulatory leeway will lead to abuse of its power seems unfounded. Previous congressional action under the Commerce Clause does not offer any convincing evidence of abuse. Congress used its "unlimited" and broad-reaching commerce power, for example, to bring our country out of the depression and to force establishments to end racial discrimination. Now, Congress attempted to work with states to provide an alternative (not a substitute) remedy in federal courts for victims of gender-motivated violence, which Congress recognized as one of the most serious forms of discrimination plaguing our country today.

Third, the majority found "no significance whatever in the state support for the Act based upon the States' acknowledged failure to deal adequately with gender-based violence in state courts, and the belief of their own law enforcement agencies that national action is essential."\textsuperscript{107} This failure brought about the paradoxical situation of a Supreme Court refusing to infringe upon states' rights when thirty-eight states submitted friend-of-the-court briefs\textsuperscript{108} explaining their own admitted failure to combat the problem.\textsuperscript{109} In their brief, the attorneys general wrote, "The States' own studies demonstrate that [their] efforts to combat gender-motivated violence, while substantial, are not sufficient by themselves to remedy the harm caused by such violence or to eliminate its occurrence."\textsuperscript{110} It seems axiomatic, legalese and constitutional considerations aside, that if a majority of states \textit{want} a civil rights problem solved, the federal government should, at the very least, have means to accomplish this end.\textsuperscript{111} The \textit{Morrison} decision leaves state courts trying...
to solve a problem they admittedly cannot handle, and Congress trying in vain to find a way to pass a statute that will assist them.\(^\text{112}\) When Congress and the states proceed together, in accord, passing bipartisan legislation to help solve a national problem of civil rights discrimination, this should impose a strong presumption for judicial deference. When the Court strikes down state-supported legislation under the guise of state protection, the Court engages in judicial activism of the strongest kind.\(^\text{113}\) As noted by the dissent, "Antonio Morrison . . . 'has won the states' rights plea against the states themselves.'"\(^\text{114}\)

This reluctance to infringe on traditional state areas demonstrates what may be the underlying ideological debate in Morrison — one between proponents of a powerful federal government and proponents of states' rights.\(^\text{115}\) The Court's opinion in Morrison may boil down to this debate, despite both sides' rhetoric about following precedent. In reality, "precedent" represented a certain political ideology (deference to Congress) that five conservative Justices believed went too long unchecked by the judicial branch. Whether or not the Court agrees with the wisdom of infringing on traditional state areas,\(^\text{116}\) the check on these kinds of laws lies in the political election of Congress.\(^\text{117}\) If Congress elects to solve a national problem that has a substantial effect on interstate commerce, it cannot be relevant that the "area" has traditionally been one of state concern.\(^\text{118}\)

\(^\text{112}\) President Clinton issued a statement expressing his deep "disappointment" following the Morrison decision. He said, "Because I continue to believe that there should be remedies for victims of gender-motivated violence, we plan to study the Supreme Court's decision . . . to determine the best means to help these victims." Laurie Asseo, Rape Victims Denied Federal Litigation, TULSA WORLD, May 16, 2000, at 5.

\(^\text{113}\) In Morrison, both sides accused the other of a form of judicial activism. The dissent accused the majority of activism in failing to follow precedent, while the majority accused the dissent of judicial activism by not following a strict interpretation of language and intent behind the Commerce Clause.

\(^\text{114}\) Morrison, 529 U.S. at 654 (Souter, J., dissenting) (citation omitted).

\(^\text{115}\) See Kathy Rodgers, Are We Really Ready for State's Rights?, SAN DIEGO UNION TRIB., May 25, 2000, at B11 (arguing that the Morrison Court's "New Federalism" is a euphemism for state's rights, which have long been a symbol and reality of second-class citizenship for women and minorities).

\(^\text{116}\) Interestingly, Justice Souter, in a footnote in his dissenting opinion, explained that he repeatedly appears before Congress to argue against the federalization of traditional state crimes and questions the wisdom of exercising commerce power to its limit. Morrison, 529 U.S. at 636 n.10 (Souter, J., dissenting). However, Justice Souter acknowledged that "violence may be found to affect interstate commerce and affect it substantially," and that congressional wisdom, not his own, must dictate. Id. (emphasis added).

\(^\text{117}\) Politics should not completely define the commerce power; however, the Morrison majority did not "merely engage in the judicial task of patrolling the outer boundaries of that congressional authority," but in fact circumscribed Commerce Clause power by framing it in terms of categorical exceptions. Id. at 652 n.19 (Souter, J., dissenting).

\(^\text{118}\) See Rodgers, supra note 115, at B11 ("[Morrison's lawyers] said violence is a local, state matter, not a federal concern. That sounds like a lot of the arguments we heard until very recently that states and local police couldn't address domestic violence because it is a family matter, not a crime. And like all the pernicious arguments during the civil rights movement supporting racial segregation because that was part of the local, historical tradition."); Shane, supra note 97, at B5 ("As for the second point — that Congress had overstepped its authority and was setting a precedent for regulating almost any activity..."
D. Section 5 of the Fourteenth Amendment, Though Not the Subject of Morrison, May Become Important to Future Civil Rights Legislation

In addition to the Commerce Clause, Congress also relied on Section 5 of the Fourteenth Amendment in enacting the GMVA. Section 5 grants Congress the power to apply the guarantees of the Equal Protection Clause to state actors and to use its discretion in deciding what legislation is necessary to secure the guarantees of the Fourteenth Amendment. Because the GMVA remedied private action, rather than state action, the GMVA faced considerable problems trying to pass as Section 5 equal protection legislation. The Morrison majority rejected the government's argument that because state justice systems perpetuate an "array of erroneous stereotypes" that result in denying victims of gender-motivated violence the equal protection of the laws, Congress had the power to deter future instances of discrimination under the Fourteenth Amendment. Citing United States v. Harris and In re Civil Rights Cases as authority, the Court held that "[the GMVA] is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any state or state actor, but at individuals who have committed criminal acts motivated by gender bias." The Court required that the GMVA specifically direct its provision toward the state criminal justice systems, rather than toward the private individual, in order for the Fourteenth Amendment to provide support for the legislation.

The government argued that the recent Supreme Court decisions of United States v. Guest and District of Columbia v. Carter stood for the new idea that

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the proper constitutional response is — "So what?" The Constitution gives each branch of government a variety of exclusive and far-ranging powers that are plainly susceptible of abuse. The president, with his pardon power, could empty the federal prisons — but no president has done that . . . . For the elected branches, the primary check on abuse of discretion is not judicial review, but political accountability: We can vote them out of office.

119. See Morrison, 529 U.S. at 619 ("Section 5 states that Congress may enforce, by appropriate legislation the constitutional guarantee that no State shall deprive any person of . . . equal protection of the laws.").


121. Morrison, 529 U.S. at 620. For examples of such stereotypes, see Lynn Hecht Schafran, Judges Cite Gender Bias Task Force Reports, JUDGES' J., Spring 2000, at 13 ("[T]he trial judge's perceptions [were] indicated by statements relating to marriage such as 'And why, in heaven's name do you buy the cow when you get the milk free. . . .'" (quoting In re Marriage of Iverson, 15 Cal. Rptr. 2d 70, 72 (1992)).

122. 106 U.S. 629, 640 (1882) (holding section 2 of the Civil Rights Act of 1871 unconstitutional on grounds that the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers").

123. 109 U.S. 3, 13 (1883) (holding public accommodations provisions of the Civil Rights Act of 1875 unconstitutional because the provisions applied to purely private conduct).

124. Morrison, 529 U.S. at 626.

125. For an expansion on this point, see Carroll, supra note 60, at 833.

126. 383 U.S. 745 (1966). In Guest, three members of the Court expressed the view that the Civil Rights Cases were wrongly decided and that Congress could prohibit actions by private individuals under Section 5 of the Fourteenth Amendment. See id. at 777 (Brennan, J., dissenting).

127. 409 U.S. 418 (1973) (containing a footnote citing the three-Justice opinion in Guest).

https://digitalcommons.law.ou.edu/olr/vol54/iss4/5
Congress could prohibit actions by private individuals, as well as state actors, under Section 5 of the Fourteenth Amendment. The Court rejected the idea that Guest mandated a new interpretation of Section 5, reasoning, "Though these three Justices saw fit to opine on matters not before the Court in Guest, the Court had no occasion to revisit the Civil Rights Cases and Harris, having determined [the indictment] in fact contain[ed] an express allegation of state involvement." Further, the Court dismissed Carter as entirely unpersuasive dicta. In sum, the Court found that because the GMVA was not corrective in its character, or adapted to redress the operation of prohibited state action, it could not pass as equal protection legislation applied to the states. The dissent did not reach the Fourteenth Amendment issue and chose not to comment on the significance of Guest in relation to future civil rights legislation. However, Justice Breyer, writing only for himself, indicated his belief that Congress should be able to enact a civil remedy against private actors.

Because Morrison did not focus on the government's Fourteenth Amendment argument, the opinion does not completely close off this type of argument in future cases. With the Court continually shrinking the size of Congress's commerce power, Section 5 of the Fourteenth Amendment may become increasingly important to the success of civil rights legislation aimed at ending discrimination against women and minorities. Particularly significant to this Fourteenth Amendment discussion is Justice Douglas's concurring opinion in Heart of Atlanta, the primary case upholding civil rights legislation passed under the Commerce Clause. In this concurrence, Justice Douglas expressed his reluctance to rest the basis for civil rights legislation solely on Commerce Clause power "not due to any conviction that Congress lacks power to regulate commerce in the interest of human rights," but because of his belief that the right of people to be free from discrimination "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel, and coal across state lines."

Justice Douglas would have passed Title II of the Civil Rights Act under Section 5 of the Fourteenth Amendment in order to avoid unnecessary litigation over

128. Morrison, 529 U.S. at 623 (quoting Guest, 383 U.S. at 756). The Court also stated, "[I]t would take more than the naked dicta contained in Justice Clark's opinion, when added to Justice Brennan's opinion, to cast doubt upon the enduring vitality of the Civil Rights Cases and Harris." Id. at 624.

129. See id. (quoting The Civil Rights Cases, 109 U.S. 2, 18 (1883)).

130. Id. at 665 (Breyer, J., dissenting). In this short analysis expressing his doubts about the majority's conclusion, Justice Breyer wrote that the GMVA "restricts private actors only by imposing liability for private conduct that is . . . already forbidden by state law. Why is the remedy 'disproportionate'?") Id.

131. As stated by Columbia University professor Michael Dorf, "None of these decisions is necessarily a bar to congressional action, but in combination, all the doors begin to close,' . . . 'Because of state sovereign immunity, and because of the narrowing of the commerce clause and the 14th Amendment, there is a fair amount that Congress cannot regulate." David G. Savage, Endangered Statutes: U.S. Law Protecting Crime Victims, Environment Could Fail, 86 A.B.A. J., July 2000, at 32, 33 (quoting Michael Dorf).


133. Id. (quoting Edwards v. California, 314 U.S. 160, 177 (1941)).
whether each particular hotel or restaurant fell within the commerce definition of the Act. Justice Douglas argued that privately owned restaurants and hotels fell under the "state action" requirement of Section 5 of the Equal Protection Clause because the discrimination at issue was enforced by officials of the state through the state judiciary. Justice Douglas's view would support the argument that gender-motivated violence was an appropriate exercise of congressional power under Section 5 of the Fourteenth Amendment because the state judiciaries enforced the discrimination Congress sought to regulate, particularly given the evidence of significant gender bias within the court system regarding violence against women.

This concurrence, combined with dicta in Guest and Harris, may provide the basis for a future argument that civil rights legislation, even legislation aimed at private individuals, falls more squarely under Congress's Fourteenth Amendment power than Congress's Commerce Clause power. Justice Douglas correctly feared that future civil rights statutes would receive the same constitutional analysis as fruit, steel, and coal; he also correctly prophesied that civil rights legislation needed a stronger constitutional foothold than the Commerce Clause power. Realistically, however, without additional support, an expansion on the three-Justice opinion in Guest, or a change in the members of the Court, the Court will not likely accept an argument of this kind. Before and after Morrison, it remains well-settled law that a Section 5 violation requires explicit state action.

134. Id. at 280 (Douglas, J., concurring). Justice Goldberg also authored a similar concurring opinion, expressing his belief that the statute should have been passed under Section 5 of the Fourteenth Amendment. Justice Goldberg wrote, "The primary purpose of the Civil Rights Act . . . is the vindication of human dignity and not mere economics." Id. at 291 (Goldberg, J., concurring).
135. Id. at 282 (Douglas, J., concurring).
136. See United States v. Morrison, 529 U.S. 598, 631 n.7 (2000) (Souter, J., dissenting) (compiling findings of various task forces on gender bias in the court system).
137. Yale law professor Akhil Amar contends that the Supreme Court could have used its power over civil rights to uphold the GMVA:

For all the debate over Congress' power over commerce . . . Amar faults the justices for ignoring the more obvious source for federal power over civil rights. "The real problem is their stingy understanding of the Civil War amendments," says Amar . . . 

"These amendments were all about empowering Congress to enforce civil rights. . . . And it's sad to say, none of the justices are willing to join that debate today."

Savage, supra note 131, at 33 (quoting Amar).
138. See Lavia v. Pa. Dep't of Corr., 224 F.3d 190, 201-02 (3d Cir. 2000). In Lavia, the court held that "Congress did not abrogate the States' Eleventh Amendment immunity pursuant to a valid exercise of its § 5 [of the Fourteenth Amendment] enforcement powers." Id. at 202. In so holding, the court cited Morrison for affirmation that the "Fourteenth Amendment prohibits only state action, and does not protect against wrongful conduct by private persons or entities." Id. at 201; see also United States v. Blaine County, 157 F. Supp. 2d 1145 (D. Mont. 2001) (citing Morrison for the idea that the Section 5 enforcement power deals only with enforcement against states and not against individuals, but distinguishing the Voting Rights Act at issue because it was directed at state actors only).
V. Practical Impact: How Have District and Circuit Courts Ruled on Various Types of Statutes Since Morrison?

For better or worse, courts must attempt to follow the Morrison standard when deciding current Commerce Clause issues. This section provides examples of different types of statutes that have been recently challenged using the Morrison decision and a brief description of the courts' treatment of each challenge. This section provides a practical tool for assessing the constitutionality of certain statutes and their application after Morrison. At the same time, this section demonstrates that Morrison places necessary regulation in jeopardy.

A. Convictions Under Racketeering Statutes Upheld Based on Each Statute's Jurisdictional Nexus

Convictions under certain federal criminal statutes, such as the Hobbs Act139 and the Violent Crimes in Aid of Racketeering statute (the VCAR),140 have been the subject of frequent challenges since the Supreme Court handed down Morrison.141 These statutes face challenges because they criminalize violent conduct that (in some instances) has an arguably negligible effect on interstate commerce. For example, the defendant in a Tenth Circuit case, United States v. Malone,142 used Morrison to argue that his conviction under the Hobbs Act was unconstitutional because the Hobbs standard required that his conduct have only a "de minimus" effect on interstate commerce.143 The defendant in Malone argued that, after Morrison, a mere de minimus effect was not sufficient to support a federal conviction.144 However, the court upheld the de minimus standard, reasoning, "Unlike the statutes at issue in Morrison and Lopez, the Hobbs Act regulates economic activity. Furthermore, the Hobbs Act contains an explicit and expansive jurisdictional element establishing that it is in pursuance of Congress's power to regulate interstate commerce."145

139. 18 U.S.C. § 1951 (1994). The statute, known as the Hobbs Act, falls under chapter ninety-five on racketeering and is entitled, Interference with Commerce by Threats or Violence. The relevant portion of the statute reads, "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . or commits or threatens physical violence to any person or property . . . in violation of this section shall be fined . . . or imprisoned . . . ." Id.
140. Id. § 1959. The statute also falls under the racketeering chapter and makes it a separate federal crime to murder, kidnap, assault, or commit other serious bodily harm to another while engaged in racketeering activities. See id.
141. See, e.g., United States v. Feliciano, 223 F.3d 102, 118 (2d Cir. 2000).
142. 222 F.3d 1286 (10th Cir. 2000).
143. Id. at 1294.
144. Id.
145. Id. at 1295; see also United States v. Morris, 247 F.3d 1080, 1087 (10th Cir. 2001) (rejecting a defendant's argument that, when applied to non-racketeering robberies, the Hobbs Act requires more than a minimal impact on interstate commerce and holding that the jurisdictional element ensures the nexus between the conduct at issue and interstate commerce).
In *United States v. Feliciano*[^146], a criminal defendant argued that his conviction under the VCAR was unconstitutional because the VCAR regulated noneconomic, violent conduct based solely on that conduct's aggregate effect on interstate commerce.[^147] The Second Circuit rejected this argument, distinguishing the statute at issue in *Morrison* and the VCAR because the VCAR included a jurisdictional element and covered only those violent crimes linked to the perpetrator's position in an enterprise engaged in racketeering activity.[^148] Further, the court reasoned that the racketeering activity satisfying the jurisdictional element — narcotics trafficking — was clearly economic in nature.[^149] While the violent conduct itself may not have a substantial effect on interstate commerce, the racketeering activity the violence is committed in connection with does have a substantial effect on interstate commerce. Because statutes with an express jurisdictional nexus (such as the Hobbs Act and the VCAR) link the violent conduct to an underlying economic activity that affects interstate commerce, the convictions will likely be upheld.[^150]

### B. Various Possession Statutes Survive Facial Challenges Because of Their Jurisdictional Nexus

Defendants also frequently challenge statutes "federalizing" the possession of a firearm by a convicted felon[^151] or the possession of a firearm by a person subject

[^146]: United States v. Feliciano, 222 F.3d 102 (2d Cir. 2000).

[^147]: Id. at 119.

[^148]: Id.

[^149]: Id.

[^150]: *United States v. Kee*, No. S1 98 CR 778(DLC), 2000 WL 863117 (S.D.N.Y. June 27, 2000) (holding the VCAR constitutional and reasoning that "it is the effect on interstate commerce of the enterprise, not the violent crime itself, which must be evaluated" and that "a purely intrastate crime will satisfy the jurisdictional element . . . if it is committed in connection with an enterprise whose activities affect interstate commerce").

to a domestic violence restraining order.\textsuperscript{152} These possession statutes face difficulty because, like the GMVA and the GFSZA, they potentially regulate intrastate, noneconomic activity. However, courts continually distinguish these possession statutes from \textit{Lopez} and \textit{Morrison} based on their jurisdiction-conferring element.\textsuperscript{153} For example, the Ninth Circuit addressed this type of challenge and held that the jurisdictional element brought the statute within congressional Commerce Clause power.\textsuperscript{154} The reasoning behind these decisions is that a jurisdictional element ensures (at least theoretically), on a case-by-case basis, that the specific violation in question affected interstate commerce. The GMVA, in contrast, created a civil remedy for all acts of gender-motivated violence, with no requirement that the specific act of violence at issue somehow affected interstate commerce.\textsuperscript{155}

C. Applications of the Federal Arbitration Act (FAA) Challenged on Grounds That the Contract Does Not Have a Substantial Link to Interstate Commerce

Two Alabama cases demonstrate confusion regarding how to apply a Commerce Clause analysis to specific contracts containing an arbitration clause governed by the Federal Arbitration Act. In \textit{Ex parte Stewart},\textsuperscript{156} independent newspaper dealers petitioned for a writ of mandamus directing a lower court to vacate an order compelling arbitration of their claims against a newspaper publisher. The court denied the writ of mandamus on grounds that the contract involved interstate commerce because the newspapers were part of the flow of interstate commerce.\textsuperscript{157} Therefore, the contract invoked the FAA and the arbitration clause was enforceable.

Interestingly, this case had a vigorous three-judge dissent, arguing that the court's opinion (1) ignored the new jurisprudence outlined in the \textit{Lopez} and \textit{Morrison}
decisions and (2) allowed application of the FAA despite the contract's insubstantial effect on interstate commerce.\footnote{158} The dissent chastised the majority for analyzing the FAA as either category-one or category-two legislation: "A contract is neither a channel nor an instrumentality, but suggests instead an activity. . . . [The] case, therefore, falls in the third *Lopez* category . . . [and] must have a substantial effect on interstate commerce."\footnote{159} Viewing the contract between the two companies as purely local and void of any substantial effect on interstate commerce, as required by *Morrison*, the dissent would not have enforced the arbitration clause in this instance.\footnote{160}

In *University of South Alabama Foundation v. Walley*,\footnote{161} the court addressed motions to compel arbitration under the FAA. The court phrased the issue as whether each contract "has the necessary affect [sic] on interstate commerce . . . to fall within the FAA's scope."\footnote{162} Thus, the court conducted a category-three analysis. In contrast to *Ex Parte Stewart*, the court summarily concluded that all contracts involving more than a nominal sum have a substantial effect on interstate commerce because they involve the exchange of property or services.\footnote{163} Interestingly, the court cited *Morrison*’s approval of *Wickard*’s aggregation principle and reasoned that the cumulative effect of the various health-care contracts make them the proper subject of arbitration.\footnote{164}

\section*{D. Child Support Recovery Act Struck Down, Despite Its Seemingly Economic Purpose}

In *United States v. Faasse*,\footnote{165} the Sixth Circuit struck down the Child Support
Recovery Act (CSRA), 166 which criminalized the nonpayment of child support on behalf of an out-of-state child, as an unconstitutional exercise of Congress's Commerce Clause authority. 167 The court stated the goals of the CSRA as (1) preventing noncustodial parents from fleeing across state lines to avoid paying child support and (2) recovering past-due support payments. 168 Yet the court held the statute unconstitutional, finding that the actual text of the statute reached "far beyond these stated goals."169 The court viewed the statute as a disruption of federalism, reasoning that the Act obliterated discretion invested in Michigan judges by creating a federal criminal penalty for disobedience of support orders. 170 This opinion followed Lopez and Morrison strictly, and interpreted the aggregate-effects principle narrowly: "[T]he Supreme Court has made clear that Wickard [only] applies to laws that are an 'essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'"171 Further, the court concluded that child support orders are not commercial in nature because they do not put an item into the flow of commerce. 172 Apparently, Congress's conclusion that $1.6 billion in interstate child support go unpaid annually did not "amount to a congressional conclusion that unpaid child support substantially affects interstate commerce."173

Faasse demonstrates that Lopez and Morrison caused substantial shifts in judicial reasoning on Commerce Clause issues: a presumption toward unconstitutionality rather than legislative deference, a "stricter" scrutiny approach rather than a rational basis approach, and a narrow view rather than a broad view of what constitutes commercial or economic activity. 174

E. Freedom of Access to Clinic Entrances Act Upheld, but on Shaky Ground

In United States v. Gregg, 175 a two-Justice majority upheld the Freedom of Access to Clinic Entrances Act (FACE) 176 as a constitutional exercise of commerce

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167. See Faasse, 227 F.3d at 662. In so holding, the court reversed a lower court affirmation of a magistrate's order to enforce a judgment against the father. Prosecutors charged the father in this case with one count of willful failure to pay past-due child support, in violation of the CSRA. See id.
168. Id.
169. Id. at 663. The court reasoned, "[T]he text of the Child Support Recovery Act contains no mention of interstate flight, nor does it confine its reach to recovery of delinquent payments . . . . This language is overinclusive; it predicates criminal jurisdiction not on flight across state lines, but on simple diversity of residence." See id. at 663-64.
170. Id. at 665.
171. Id. at 671 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).
172. Id. at 669.
173. Id. at 671.
174. The original Faasse opinion, explained in this section, found the argument that debts from one state to another are commercial in nature unpersuasive, reasoning that support obligations represent passive, rather than active, obstructions to commerce. Id. 668-69. As previously explained, this holding has since been overruled. See supra note 165.
175. 226 F.3d 253 (3d Cir. 2000).
power.\textsuperscript{177} FACE bars abortion protesters from blocking the entrances to reproductive-health-care clinics and provides a civil remedy to compensate individuals and health-care facilities for harm caused by blockades.\textsuperscript{178} In upholding the statute, the court acknowledged that the statute’s connection to economic activity plays a key role in determining constitutionality under the Commerce Clause, but held that "economic activity can be understood in broad terms."\textsuperscript{179}

The court distinguished FACE from the GMVA by stating, "[U]nlike the activity prohibited by [the GMVA], the misconduct regulated by FACE, although not motivated by commercial concerns, has an effect which is, at its essence, economic."\textsuperscript{180} Both statutes provided a civil remedy for violent conduct directed at a certain group and motivated by animus. Gregg distinguished the two statutes on grounds that FACE prescribes violent conduct directed at a commercial enterprise, rather than an individual. However, as argued by the dissent in Gregg, "Morrison made it clear that the nature of the activity to be restricted is determined by an examination of the conduct itself, and not by such external factors as financial effects, which are one step removed from the statute's focus."\textsuperscript{181} Thus, Gregg purports to follow Morrison, but actually relies on a more expansive definition of economic activity than the Morrison majority would likely allow.

A federal case out of Michigan, Norton v. Reno,\textsuperscript{182} also upheld the constitutionality of FACE. In Norton, plaintiffs desiring to protest outside an abortion clinic sought injunctive relief from enforcement of FACE on grounds that the statute exceeded the Commerce Clause power. The court denied the injunction and distinguished Morrison on grounds that reproductive-health-service centers, the objects of the regulation, engage in interstate commerce.\textsuperscript{183} Therefore, the court reasoned, Congress sought to regulate a commercial facility rather than "crime against another individual on the basis of gender" as in Morrison.\textsuperscript{184}

Congress should be able to pass statutes such as FACE under the commerce power; however, in light of Morrison, FACE encounters considerable problems due to the similarity between the GMVA and FACE. Both statutes, at their core, seek to protect individuals from discriminatory behavior. (It is hard to imagine that, in passing FACE, Congress had the economic stability of the abortion clinics in mind.) The fact that the behavior, in the case of FACE, takes place directly outside a

\textsuperscript{177} Gregg, 226 F.3d at 267.
\textsuperscript{178} See id. at 257.
\textsuperscript{179} Id. at 262. As authority, the Gregg court cited numerous circuit cases upholding FACE; however, every case cited was issued prior to the Morrison decision. See id. at 261.
\textsuperscript{180} Id. at 262.
\textsuperscript{181} Id. at 270 (Weis, J., dissenting). The dissent also offered an interesting counterargument to Part IV.D of this note (which argues that Morrison did not follow Heart of Atlanta precedent). The dissent distinguished Heart of Atlanta from Morrison by pointing out that it was the hotels and restaurants, the economic entities themselves, that had to alter their conduct under the statute, rather than third parties whose conduct may or may not have been commercial. Id.
\textsuperscript{182} No. 4:00-CV-141, 2000 WL 1769580 (W.D. Mich. Nov. 24, 2000) (citing Gregg as authority to uphold the constitutionality of FACE).
\textsuperscript{183} Id. at *5.
\textsuperscript{184} Id.
commercial establishment seems to be an arbitrary distinction. By this rationale, if the GMVA had prohibited acts of violence against women within so many feet of a grocery store and been called the Freedom of Access to Grocery Store Parking Lots, would the GMVA have been constitutional? If the Supreme Court does ultimately uphold FACE, it will have to do so based on a somewhat arbitrary distinction. These types of arguments, over whether the activity being regulated is sufficiently "economic" in nature, will continue to plague the courts until the Court announces a less malleable test.

F. Environmental Statute Upheld, but Also on Shaky Ground

After the Morrison decision, which affirmed the Fourth Circuit's finding of the GMVA's unconstitutionality, the Fourth Circuit addressed another Commerce Clause challenge, this time to an environmental regulation. Surprisingly, the Fourth Circuit upheld the statute.185 This case, Gibbs v. Babbit,186 provides a telling example of the lingering and unsettled controversy engendered by the Morrison decision. Gibbs upheld a Fish and Wildlife Service regulation187 limiting the "taking"188 of red wolves on private land as a constitutional exercise of Congress's power under the Commerce Clause.189 The court labeled its standard of review as "rational basis review with teeth," yet also counseled that "courts may not simply tear through the considered judgments of Congress."190

The court upheld the statute as category-three regulation, that which has a substantial effect on interstate commerce, for four reasons.191 The court (1) viewed the taking of red wolves on private land as a sufficiently "economic" activity due to its effect on tourism, scientific research jobs, and trade in fur pelts;192 (2) applied the Wickard aggregation principle and found the effect on interstate commerce substantial in light of the larger regulatory scheme of the Endangered Species Act;193 (3) found that wildlife regulation was not an area of traditional state concern;194 and (4) determined that the regulation did not infringe on state

186. 214 F.3d 483 (4th Cir. 2000). Interestingly, the dissenting judge in this case, Judge Luttig, authored the Fourth Circuit opinion affirmed in Morrison.
187. 50 C.F.R. § 17.84(c) (1998). Congress passed this statute pursuant to a specific provision in the Endangered Species Act, which allows the Fish and Wildlife Service to issue regulations governing the taking of experimental reintroduced animal populations under limited circumstances. See Gibbs, 214 F.3d at 488.
188. "Taking" for the purposes of this statute means harassing, harming, shooting, wounding, killing, trapping, capturing, collecting, or attempting to engage in any such conduct. See id. at 487.
189. Id.
190. Id. at 490.
191. The district court upheld the legislation as category-two legislation, reasoning that the red wolves were "things" in interstate commerce because they moved across state lines and generated tourism. Gibbs v. Babbit, 31 F. Supp. 2d 531, 535 (E.D.N.C. 1998).
192. Gibbs, 214 F.3d at 491 ("[E]conomic activity must be [viewed] in broad terms. Indeed, a cramped view of commerce would cripple a foremost federal power and so in doing would eviscerate national authority.").
193. Id. at 497-98.
194. Id. at 499-500.
police power because, unlike the GFSZA and the GMVA, the regulation did not duplicate or supplement state law.\textsuperscript{195} Predictably, the dissenting judge in Gibbs, who authored the Fourth Circuit en banc opinion affirmed by Morrison, accused the majority of following the Morrison dissent.\textsuperscript{196} The dissenting judge also rejected the majority's use of aggregation and reasoned that the killing of . . . all forty-one of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity of the kind held by the Court . . . in Morrison to be of central concern to the Commerce Clause, if it could be said to constitute an economic activity at all.\textsuperscript{197}

Although the dissenting judge in Gibbs criticized the majority for not following Morrison, the dissent should have criticized the authors of Morrison for not outlining a higher level of scrutiny than rational basis, if that is what courts are meant to employ. While the Gibbs opinion did more closely mirror Justice Souter's dissent in Morrison than the majority, it also mirrored sixty years of precedent not explicitly overruled by Morrison. Gibbs not only demonstrates Morrison's unworkability, but also demonstrates the very real possibility that environmental protection will soon play second fiddle to the whims of local government. The Gibbs determination that this statute regulated "economic" activity rests on a weak foundation in light of Morrison and proves that the Supreme Court should not have invoked this categorical approach to Commerce Clause regulation. Environmental regulation passed under the commerce power hangs in the balance until the Supreme Court backs away from Lopez and Morrison.\textsuperscript{198}

\textsuperscript{195} Id. at 503.
\textsuperscript{196} See id. at 508 (Luttig, J., dissenting) ("In a word, the expansive view of the Commerce power expressed by the majority today is [more] akin to that separately expressed by Justice Breyer in his dissent in Lopez and Justice Souter in his dissent in Morrison, and certainly more closely akin to those dissenting Justices' views than it is to the [majority].").
\textsuperscript{197} Id. at 507 (Luttig, J., dissenting).
\textsuperscript{198} A Supreme Court decision in the environmental context, Solid Waste Agency v. United States Army Corps of Engineers, struck down Congress's attempt to protect habitats of migratory birds through certain provisions of the Clean Water Act, based on the Lopez/Morrison rationale. Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). The same five-Justice majority and the same four-Justice dissent as in Morrison disagreed again over issues of federalism. The Court held that a rule extending the definition of navigable waters under the Clean Water Act to include intrastate waters used as habitats by migratory birds exceeded authority granted to the Engineer Corps under the Clean Water Act. Id. at 167. Thus, the Court allowed a local subdivision contractor to discharge dredged material into a sand and gravel pit that served as a habitat for migratory birds. The dissent argued, Had petitioner intended to engage in some other activity besides discharging fill (i.e. had there been no activity to regulate), or, conversely, had the waters not been habitat for migratory birds (i.e. had there been no basis for federal jurisdiction), the Corps would never have become involved in petitioner's use of its land. There can be no doubt that, unlike the class of activities Congress was attempting to regulate in [Morrison] and [Lopez], the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons.

\textit{Id.} at 193 (Stevens, J., dissenting).

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G. Fair Housing Act Amendments (FHAA) Survive Challenge by Local Housing Provider

In *Groome Resources, Ltd. v. Parish*, a parish refused to approve a special zoning accommodation to allow the operation of a group home for Alzheimer's patients. After the housing provider sought injunctive relief under the "reasonable accommodation" provision of the FHAA, the parish challenged the accommodations provision as an unconstitutional exercise of Commerce Clause power. The Court of Appeals for the Fifth Circuit conducted a category-three analysis, applied the four factors outlined in *Morrison*, and found that the FHAA substantially affected interstate commerce. Finding that the Act regulates the economic activity of purchasing and renting a home, the court reasoned that the denial of housing to a disabled person is an "act of discrimination that directly interferes with a commercial transaction, and is an act that can be regulated to facilitate economic activity." Thus, the court viewed discrimination as the activity being regulated, and then viewed its impact on commerce as substantial because that discrimination resulted in an individual's inability to participate in an economic transaction.

Notably, this reasoning is similar to that argued for and rejected in *Morrison*. The Fifth Circuit emphasized the "strong tradition of civil rights enforced through the Commerce Clause" and the "broadly defined 'economic' aspect of discrimination." Additionally, the court acknowledged the traditionally local nature and local power of zoning boards, but recognized the need for federal courts to step in and enforce antidiscrimination when that discrimination is the direct result of local bias. *Groome Resources* demonstrates that federal institutions such as the FHAA may face increasing constitutional challenges because they arguably direct legislation at "purely local" decisions such as zoning.

H. What Can Practitioners Glean from These Decisions?

From these post-*Morrison* decisions, practitioners can draw four conclusions. First, as long as a statute contains a jurisdictional nexus such as "that moved in interstate commerce" or "that was transported in interstate commerce," it will likely be upheld. Second, statutes closely related to family law, divorce law, or criminal law that do not contain a jurisdictional element may face insurmountable constitutional arguments because they are noneconomic and infringe on a traditional area of state concern. Courts can, after *Morrison*, draw conclusions based solely on

Further, the dissent reasoned, "[T]he migratory bird rule does not blur the 'distinction between what is truly national and what is truly local' [citing *Morrison*]. Justice Holmes cogently observed in *Missouri v. Holland* that the protection of migratory birds is a textbook example of a national problem." *Id.* at 195 (Stevens, J., dissenting) (citations omitted). This case demonstrates the profound effect of the new Commerce Clause approach on environmental protection measures.

199. 234 F.3d 192 (5th Cir. 2000).
201. *Groome*, 234 F.3d at 205.
202. *Id.* at 205-06.
203. *Id.* at 209.
204. *Id.* at 216.
the category of conduct being regulated (e.g., family law = noneconomic = unconstitutional), and are not forced to consider the more removed effects of the conduct on interstate commerce. Third, the *Lopez/Morrison* standard will not produce logical or consistent opinions. As the cases in Part V demonstrate, the Commerce Clause determination will inevitably vary based on whether the judge applies a more lenient, *Wickard*-type rational basis test or a stricter version of the rational basis test. Courts have excessive judicial leeway to decide whether certain activities are or are not sufficiently "economic" in nature. Thus, practitioners should address each of the four *Morrison* considerations, focusing on proving or refuting the "economic" nature of the activity being regulated. Unfortunately, future decisions will likely split down ideological lines, will have vigorous dissents, and will reveal the controversy generated, rather than solved, by the *Morrison* decision. Finally, civil rights legislation aimed at preventing individual discrimination in a local or noneconomic context is in serious jeopardy unless the Court gives Congress another avenue to pass civil rights legislation.

**VI. Conclusion: The Court Should Head Back in the Pre-Lopez Direction**

The Framers of the United States Constitution, in granting Congress the power to regulate interstate commerce, did not contemplate Congress using the commerce power to combat gender-motivated violence. The Framers also did not contemplate Congress using the commerce power to end racial segregation in local restaurants, to lead the country out of the depression, or to ensure housing for the disabled. Certainly, the Framers did not contemplate our complex, increasingly connected interstate economy resulting from technological innovations such as aviation and the Internet. However, an absence of contemplation must not equal an absence of constitutional authority to regulate. In fact, federalism must rely on flexibility, a mutual interdependence between state and federal governments that expands and contracts as the country's needs change.

The GMVA provided a perfect example of this need for such flexibility: violence against women, as an activity, is noneconomic in nature and has traditionally been an area of state regulation. However, in light of developments in our understanding of the discriminatory motivation behind violence against women, coupled with states' inability to combat the problem, Congress recognized that this particular type of activity evolved into an area of federal, as well as local, concern. The GMVA accomplished important, desirable aims and provided a civil remedy to victims of gender-motivated violence in the Tenth Circuit and federal courts across the nation.

After *Morrison*, courts have free range to second guess congressional conclusions based on years of research and compilations of data. This new Commerce Clause

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205. Another example of questionable legislation includes the regulation of hate crimes, which make it a federal crime to attack another based on race, religion, or national origin. *See* Savage, supra note 131, at 33. The House recently backed a measure that would add sexual orientation, sex, and disabilities to this list. *See* Lizette Alvarez, *House Backs Adding Gays to Hate Crime Law*, N.Y. Times, Sept. 14, 2000, at A20. However, according to law professor Erwin Chemerinsky, "A hate crimes law for gays would be very difficult to justify under the Brzonkala decision." *See* Savage, supra note 131, at 33.
analysis leaves civil rights, environmental, and other types of legislation in jeopardy and ultimately leads the country down a destructive path. Instead of the heightened judicial scrutiny endorsed by *Morrison*, the check on commerce power must be the democratic process.\textsuperscript{206}

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\textsuperscript{206} As eloquently stated by Justice Breyer,

Courts must give Congress a degree of leeway in determining the existence of a significant factual connection to interstate commerce — both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.
