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Title III of the Violence against Women Act: The Answer to Domestic Violence or a Constitutional Time-Bomb Comment.

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TITLE III OF THE VIOLENCE AGAINST WOMEN ACT: THE ANSWER TO DOMESTIC VIOLENCE OR A CONSTITUTIONAL TIME-BOMB?

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I. INTRODUCTION

The Violence Against Women Act (VAWA)[1] was enacted in 1994 to combat the growing and widespread epidemic of domestic violence.[2] In his introduction of the bill, Senator Joseph Biden emphasized the need to fight against an escalating "blight" of violence against women.[3] Congres-

1. The Violence Against Women Act is a subchapter of the Violent Crime Control and Enforcement Act. Violence Against Women Act, Pub. L. No. 103–322, 108 Stat. 1902–55 (codified in part at 42 U.S.C. § 13981 (1994)).

2. *See* S. REP. NO. 102–197, at 36 (1991) (documenting growth of domestic violence). Only sixteen months after the Violence Against Women Act was introduced in June of 1990, the Senate Committee on the Judiciary reported that incidents of sexual assault against women increased by approximately 1.3 million, and an estimated 4 million more women were abused in their homes. *Id.* The Committee stated: "The urgency [for a response] reflects not only the increasing number of victims, but also the puzzling persistence of public policies, laws, and attitudes that treat some crimes against women less seriously than other violent crimes." *Id.*; *see also* S. REP. NO. 101–545, at 27–28 (1990) (noting that problem of domestic violence calls for legislative response). VAWA responds to a growing national problem—"violence against women." *Id.* at 27. Most Americans associate violence against women with specific cases of extreme brutality, which make for sensational newspaper headlines. For instance, most Americans would probably recall and identify a recent headline which read "Four Freshman Women Killed at the University of Florida" as a specific event of violence against women. *Id.* However, VAWA was enacted to address the day-by-day violence that women from every socio-economic background experience. *Id.* On the other hand, one commentator argues that Title III fails to protect many of the victims it purports to help. *See* Birgit Schmidt Am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1, 9 (1995) (asserting that Title III's "crime of violence" requirement and its demand of proof of violence motivated by gender "will exclude many of the victims it hopes to assist"). Further, since crime statistics show that men are more likely to be the victims of homicide, robbery and aggravated assaults, it has been alleged that men, not women, are in need of a comprehensive remedy against violence. *See* Cathy Young, *Rule of Law, The Constitution and the "Weaker" Sex*, WALL ST. J., Aug. 21, 1996, at A15 (explaining that men compose "three quarters of homicide victims and two-thirds of victims of robbery and aggravated assaults" while arguing that women, particularly upper-middle class women, will utilize Title III as leverage tool in divorce actions, compromising its intended use).

3. *See* S. REP. NO. 102–197, at 33 (1991) (examining purpose behind enactment of VAWA and providing that primary reason for Act was to address national problem of domestic violence); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 (1993) (arguing necessity of considering domestic violence as

sional committees assigned to study this epidemic found that violent attacks by men topped the list of dangers to an American woman's health.[4] In fact, studies show that every fifteen seconds a woman is battered, and every six minutes a woman is raped in the United States.[5] Despite these staggering statistics, the greatest injustice to battered women is society's acceptance of domestic violence as normal behavior. Society tends to dismiss the impact domestic violence has on women by rationalizing a man's violent acts.[6] Regrettably, society has become desensitized to the plight of battered women because of the volume of crimes committed against

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pressing social and legal problem in United States); *see also* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 272–73 (1985) (documenting serious problem of domestic violence by noting that approximately 6,000,000 women in America are battered each year). Professor Waits also notes that the personal and social costs of "wife abuse are staggering," and that these costs are further perpetuated by the cycle of violence from one generation to the next. *Id.* at. 274–75. In order to stop this cycle of violence, there must be swift intervention after the first violent incident occurs within the family unit. *Id.* at 278. Since a batterer's aggression and a woman's response to victimization are learned responses, "[t]he longer these responses persist, the harder they are to unlearn." *Id.*

4. *See* S. REP. NO. 102–197, at 37–38 (1991) (examining prevalence of violent crimes committed against women); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 523 (1992) (identifying domestic violence as leading cause of injury to women). Professor Schneider notes that on a national level, police involvement in battering cases exceeds police involvement in rape, murder and assault combined. *Id.*; *see also* Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 671 (1986) (noting that women are much more likely to suffer recurrent abuse from their husbands). Society's general acknowledgment that the major impact of domestic violence is felt by women is reflected in the fact that society, as a whole, recognizes terms such as "marital violence" and "spousal abuse" as terms that describe wife abuse or beating. *Id.* at 672; *see also* James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1152–56 (1995) (noting domestic violence as leading cause of injury to women and acknowledging slow legislative response as primary factor for exacerbation of problem).

5. *See* S. REP. NO. 101–545, at 27 (1990) (opining that minute-by-minute violence inspired enactment of VAWA (citing FBI Uniform Crime Rep. 7 (1988))).

6. *See* S. REP. NO. 102–197, at 45 (1991) (stating that society suffers from "unfortunate blind spot" when it comes to crimes against women); *see also* Lisa M. Fitzgerald, *The Violence Against Women Act: Is It an Effective Solution?*, 1 HOW. SCROLL: THE SOC. JUST. REV. 46, 48–50 (1993) (asserting that societal beliefs and misconceptions contribute to difficulty in fighting violence against women). Two common misconceptions are: (1) a wife cannot be raped by her husband, and (2) a prostitute cannot be raped by her client. *Id.* In both cases, consent is either irrelevant or presumed. *Id.* These unfortunate societal attitudes "create obstacles in the effort to reduce violence against women." *Id.*; *see also* Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 672 (1986) (arguing that societal indifference to domestic violence compounds problem faced by battered women). The

women.[7] Further exacerbating this plight is society's lack of concern for victims of domestic violence, which is largely attributable to the general public's ignorance regarding the magnitude of domestic abuse.[8] Consequently, violent crimes against women are not perceived as a societal hazard. Instead, domestic violence is viewed as a private matter, a problem to be resolved within the family unit.[9]

In an attempt to raise society's awareness of the problem of violence against women and to ameliorate the victimization of women, Congress enacted VAWA. Specifically, Title III of VAWA establishes a federal civil right for victims of violent, gender-motivated crimes, providing victims with either injunctive or monetary compensation.[10] Consequently, there have been questions about the constitutionality of Title III. The first two cases to challenge the constitutionality of Title III are *Doe v. Doe*[11] and

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failure of police, prosecutors, and judges to address the problem of domestic violence typifies society's hesitation to confront the problem. *Id.*

7. *See* NANCY HUTCHINGS, THE VIOLENT FAMILY: VICTIMIZATION OF WOMEN, CHILDREN AND ELDERS 18 (1988) (asserting that growth of domestic violence has numbed society's awareness of problem).

8. *See id.* at 18–23 (suggesting that gender stereotyping is one cause of society's lethargy). Hutchings asserts that developmental theories taught to medical health professionals have been based on Freudian theories of psychosexual development. *Id.* at 18. Freudian theories espoused the views that man is physically superior and sexually aggressive, while the woman's role is deemed passive and receptive. *See id.* (concluding that Freudian theories translated into widespread belief that women derived sexual pleasure from abuse); LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 12 (1986) (reasoning that medical and police categorization of injuries is one factor contributing to problem of under-reporting). Doctors often designate injuries incurred from domestic abuse as "accidental," "traumatic," or sustained from an "unspecified origin." *Id.* at 12–13. Further, police label assaults between intimates as "domestic disturbances" or "family trouble," and therapists categorize psychological problems inflicted by domestic abuse as "depression," "paranoia" or "anxiety neuroses." *Id.*; *see also* ELIZABETH PLECK, DOMESTIC TYRANNY 7 (1987) (noting most consistent barrier to domestic abuse reform to be idea of "family ideal"). The "family ideal" is defined as unrelated but distinct concepts relating to the privacy of the family, stability of the home and the right of access to children by parents and spouses. *Id.* A crucial element of the "family ideal" is the belief in the separate, private nature of the family unit. *See id.* at 8 (asserting that "family ideal" concept results in less government intervention in family affairs).

9. *See* S. REP. NO. 102–197, at 39 (1991) (noting reluctance of society to intervene in "private" affairs). One commentator notes: "'[G]arden variety' domestic abuse is . . . often considered to be a personal family matter, which jurors, police or the general public believe should not be criminalized as assault and battery." Lisa M. Fitzgerald, *The Violence Against Women Act: Is It an Effective Solution?*, 1 HOW. SCROLL: THE SOC. JUST. REV. 46, 50 (1993).

10. Violence Against Women Act, Pub. L. No. 103–322, 108 Stat. 1902–55 (codified in part at 42 U.S.C. § 13981 (1994)).

11. 929 F. Supp. 608 (D. Conn. 1996).

Brzonkala v. Virginia Polytechnic & State University.[12] In *Doe*, the United States District Court for the District of Connecticut held the enactment of Title III to be a valid exercise of Congress's Commerce Clause powers.[13] However, in *Brzonkala*, the United States District Court for the Western District of Virginia took the contrary view, holding that Congress exceeded its power under the Commerce Clause by enacting Title III.[14] Both courts based their holdings on the Supreme Court's landmark ruling in *United States v. Lopez*,[15] which narrowed the Court's interpretation of Congress's Commerce Clause powers.[16]

Notwithstanding the controversy surrounding Title III's constitutionality, VAWA remains a useful tool in addressing domestic violence. In fact, VAWA contains additional provisions all states, including Texas, should utilize to quell the surge in violence against women.[17] For instance, Title II of VAWA provides federal grants to states willing to implement pro-arrest policies and training and education programs in domestic violence

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12. 935 F. Supp. 779 (W.D. Va. 1996).

13. *See Doe*, 929 F. Supp. at 616–17 (holding Violence Against Women Act as constitutional exercise of congressional authority under Commerce Clause). The United States District Court for the District of Connecticut further noted that VAWA is reasonably adapted to the goal of deterrence of gender-based violent crimes and concluded by noting that analysis under the Fourteenth Amendment was unnecessary in light of the holding. *Id.* at 617.

14. *See Brzonkala*, 935 F. Supp. at 801 (holding Violence Against Women Act unconstitutional under Commerce Clause and Enforcement Clause of Fourteenth Amendment). One commentator states that Congress created an "ideological monster" with its enactment of the Violence Against Women Act and asserts that the Act will prove to be a litigation and mischief breeder. *See* Editorial, *State Law Is Capable of Protecting Women*, GREENSBORO NEWS & REC., July 31, 1996, at A8 (arguing VAWA is unnecessary in war against domestic violence), *available in* 1996 WL 5779756. The *Brzonkala* suit was merely a tool to advance a particular feminist belief, and the defendants were mere "stage props." *Id.*; *see also* Editorial, *Women's Rights*, RICHMOND TIMES-DISPATCH, Aug. 1, 1996, at A10 (asserting reasoning provided to support VAWA's constitutionality was precarious), *available in* 1996 WL 2306449. Congress claims VAWA is a constitutional act under its Commerce Clause powers, reasoning that rape victims might miss work and these absences may affect interstate commerce. *Id.* If this broad standard is deemed acceptable as a constitutional standard, then Congress's powers are without limits, and thus a clear contradiction to the Constitution's mandate of a limited federal government. *Id.*

15. 514 U.S. 549 (1995).

16. *Cf. id.* at 551 (holding congressional power exceeded by enacting Gun-Free School Zone Act).

17. *See* S. REP. NO. 103–138, at 47 (1993) (proclaiming Title IV, Equal Justice for Woman in Courts, provides training for judges on issues like sexual assault and domestic violence); S. REP. NO. 102–197, at 40 (1991) (reporting one purpose of Title I, Safe Streets for Women Act, is increasing safety for women in public places, particularly on public transit).

for judges, prosecutors, and law enforcement officers.[18] Therefore, segments of VAWA remain viable methods for combating gender-motivated crimes.

This Comment analyzes the constitutionality of Title III of the Violence Against Women Act and the Act's usefulness to state legislatures combatting domestic violence. Part II presents a historical overview of the legal response to violence against women. Section A reviews the history of domestic violence and the failures of the existing legal remedies. Section B sets forth the provisions and goals found under Title III, and examines how Title III purports to address the failures of the existing legal remedies. Part III addresses the constitutional debate under both the Commerce Clause and the Fourteenth Amendment, arguing that the advent of *Lopez* renders Title III an unconstitutional exercise of Congress's powers under the Commerce Clause. Additionally, Part III concludes with a recommendation that may save VAWA from being found unconstitutional. Part IV provides an in-depth analysis of where Texas courts and legislation stand regarding their position on violence against women and concludes with suggestions for the Texas legislature and court system on how to use Title II of VAWA as a tool to address the problem of violence against women in Texas.

II. THE LEGISLATIVE RESPONSE

A. *Historical Perspective of an Age-Old Problem*

1. Historical Overview of the Legal Response to Violence Against Women

Traditionally, English common law gave a husband the right to physically abuse his wife as a form of discipline.[19] While early American courts adopted the English "rule of thumb," whereby men were expressly given the right to beat their wives provided they used a stick no larger in diameter than their thumb,[20] spousal abuse was perceived to be inappro-

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18. *See* S. REP. NO. 103–138, at 44 (1993) (providing that Title II, Safe Homes for Women, "creates a model state program encouraging comprehensive reform in arrest, prosecution and judicial policies").

19. *See* Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 709 (1989) (noting English common law granted husband right to physically discipline his spouse). English common law recognized a husband's right to use physical force on his wife; and because American law is modeled after English law, early American courts recognized a similar right. *Id.*; *cf.* Seymours Case, 72 Eng. Rep. 874 (K.B. 1613) (suggesting for first time in English law that wife might have remedy against husband for unreasonable "correction").

20. *See* Bradley v. State, 1 Miss. (1 Walker) 156, 158 (1824) (recognizing early American law's sanctioning of husband's right to exercise moderate chastisement in cases of great

priate behavior by the end of the nineteenth century.[21] However, the plight of battered women persisted.[22] In fact, it was not until the rise of the feminist movement in the latter half of the twentieth century that

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emergency without subjection to prosecution); DEL MARTIN, BATTERED WIVES 32 (1976) (noting that short of extreme cases, courts would not interfere in cases of wife-abuse); JOHN STUART MILL, THE SUBJECTION OF WOMEN 252 (1929) (asserting need for criminal sanctions to reform treatment of women). Mills writes:

> When we consider how vast is the number of men, in any great country, who are little higher then brutes, and that this never prevents them from being able, through the law of marriage, to obtain a victim, the breadth and depth of human misery caused in this shape alone by the abuse of the institution swells to something appalling.

Id.; *see also* LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 4 (1986) (acknowledging "norms" against use of lethal weapons in wife abuse developed during 18th and 19th centuries, but noting that violations of these norms were rarely punished). Okun traces the history of domestic violence from the time of Romulus in Rome to the 19th century, noting that despite progressive reforms, in the last three centuries men were continuously allowed to beat their wives with the community's approval. *Id.* In fact, it was not until the mid-1970s that a husband's enforcement of his conjugal privilege was interpreted as spousal rape. *See id.* at 5 (describing birth of reforms regarding abuse of women in America); ELIZABETH PLECK, DOMESTIC TYRANNY 17–18 (1987) (describing Puritan view against domestic violence, but noting that protecting male-dominated family was still more important than protecting victims of violence). Puritans labeled family violence as "wicked carriage," a term used to refer to domestic violence as sinful behavior. *Id.* Puritans believed family violence was a threat to the community's standing before God; punishment of the individual was the only way God would extend protection to the Puritan community. *Id.* Moreover, the motive for the Puritan laws against domestic violence was to demonstrate to each other and God the Puritans' vigilance against sin. *See id.* at 18 (stating that neighbors were expected to scrutinize each others' actions so that sins would not jeopardize entire community's standing in eyes of God).

21. *See* Birgit Schmidt Am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1, 3–4 (1995) (noting that it was "not until the Progressive Era [that] wife beating [was] considered a form of family violence"). Busch asserts that during the Progressive Era, wife-beating was widely considered to be a result of environmental stress and lack of education. *Id.*

22. *See* Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 709–10 (1989) (arguing that American legal system inadvertently condones domestic violence due to police and prosecutorial ignorance in understanding domestic disputes). In order to preserve the sanctity of the family unit, courts generally ignored family violence complaints, which they found trivial. *See id.* (discussing superficial actions taken by police in response to family violence and court's failure to prosecute batterers); James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1151 (1995) (noting that courts and legislatures largely ignored plight of battered women). Not until 1984, did courts begin to reject notions that domestic violence was not a serious offense. Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims*, 15 CARDOZO L. REV. 525, 533 (1993).

violence against women was thrust into the political scene.[23] Despite this attention, governments at all levels were reluctant to intervene in what they perceived to be private family conflicts.[24] This reluctance was partly due to the belief that the legal system was ill-equipped to deal with domestic violence and "that interference would only exacerbate the violence by further angering the batterer."[25] Although laws were promulgated to refute these beliefs,[26] institutional obstacles in the criminal justice system and social sexism rendered these laws ineffective in curtailing the battle against domestic violence.[27]

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23. *See* ELIZABETH PLECK, DOMESTIC TYRANNY 184 (1987) (discussing recognition of violence issues affecting women during feminist movement of 1960s and 1970s). Pleck notes that "[r]adical feminism, most critical of the traditional family, was responsible for the subsequent rediscovery of wife beating." *Id.* This rediscovery was a result of younger women breaking away from the larger civil rights movement, after encountering male prejudice, and establishing small local women's groups in which they shared their personal experiences with one another. *See id.* (noting that small groups composed of younger women sought generalizations of their collective experiences to create larger understanding of female abuse). One commentator notes that "[o]ne of the most important feminist achievements has been the politicization of private activities such as wife abuse and domestic labor." Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 709 n.42 (1989). The feminist movement spurred other movements, like the battered women's movement, which "helped bring the problem of domestic violence to the public's attention." *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1499, 1502 (1993).

24. *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1502 (1993) (noting that state legislatures believed violence against women to be family matter in which legal system should not intervene).

25. *Id.*; *cf.* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 271 (1985) (rejecting proposed rationalizations used to justify legal system's reluctance to exercise its powers against batterers). The effect of these rationalizations is to condone wife beating. *Id.* Although the law is not a panacea for resolving this complex problem, it must play a significant part in the battle against domestic violence. *Id.* The "sophisticated excuse" that legal institutions are ill-equipped to deal with domestic violence is a *post hoc* justification for inaction. *Id.* at 301. Waits argues that someone must move against abuse because "no other social institution has the legal system's clout to protect victims and to force batterers to face the consequences of their transgressions." *Id.* at 302.

26. *See generally* TEX. FAM. CODE ANN. § 71.04 (Vernon 1996) (providing victims of family violence right to obtain civil protective orders against their abusers); TEX. CRIM. PROC. CODE ANN. art. 14.03 (Vernon Supp. 1997) (enabling peace officers to arrest, without warrant, persons whom officer believes to have violated protective order or person who assaulted member of his family).

27. *See* Constance Frisby Fain, *Conjugal Violence: Legal and Psychosociological Remedies*, 32 SYRACUSE L. REV. 497, 552 (1981) (describing police preference to divert domestic problems from criminal process). Police superiors frequently instruct officers to avoid arresting batterers; instead, the police officers are told to refer these batterers to social service agencies. *Id.* Prosecutorial response is often similarly deficient in addressing con-

2. Failures of the Existing Legal Remedies

Existing legal remedies have failed to protect abused women for two reasons: first, civil rights laws are ill-suited for gender-based violence;[28] secondly, state remedies are thwarted by both formal and informal barriers to punishment.[29] The former constraint is manifested in Title VII of the Civil Rights Act of 1964. Because Title VII was designed to eradicate gender discrimination in the work place,[30] this legislation precludes victims of domestic abuse from availing themselves of its remedies.[31] Moreover, post-Civil War protective legislation, such as the Fourteenth Amendment, was designed to combat racially motivated violence and is therefore inapplicable in the realm of domestic violence.[32] One commentator explains that "because of the nature of gender-based violence, these laws [current civil rights legislation] are not adequate for vindicating the

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jugal violence. *Id.* at 559. Generally, when domestic abuse cases reach a prosecutor's office, the screening process emphasizes the use of temporary adjustment and diversion, as opposed to prosecuting the batterer. *Id.*; *see also* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2118 (1993) (arguing that domestic violence cases should be excluded from "mediation where . . . culture of battering has been established"). Fischer notes that the use of mediation is "widespread and growing" in the resolution of domestic violence cases. *See id.* at 2142 (listing situations in which mediation is imposed to address issues regarding domestic "relations"). Numerous studies indicate that "the most dangerous time for a woman is when she divorces or separates from her spouse." *Id.* Violence is a tool the abusive spouse utilizes to control and dominate his victim. *Id.* Therefore, mediation is the wrong theory and the wrong practice to be utilized in resolving relationships that have descended into a "culture of battering." *Id.*

28. *See* W. H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 592 (1993) (discussing inadequacy of current civil rights legislation as applied to domestic abuse).

29. *See id.* at 595–98 (detailing biased nature of existing state remedies as applied to gender-based violence).

30. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17 (1988).

31. *See* W. H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 593 (1993) (stating that Title VII "provides a civil rights remedy for gender crimes committed in the workplace, but not for gender crimes committed on the street or in the home"). One commentator argues that current civil rights laws ignore the problem faced by some plaintiffs who experience more than one type of discrimination. *See* Sara E. Lesch, *A Troubled Inheritance: An Examination of Title III of the Violence Against Women Act in Light of Current Critiques of Civil Rights Law*, 3 COLUM. J. GENDER & L. 535, 543–44 (1993) (asserting that current civil rights legislation has limited applicability because it fails to recognize certain types of discrimination). Consequently, courts that have attempted to adapt existing civil rights statutes in order to accommodate unanticipated plaintiffs, like domestic abuse victims, have attained only limited success. *Id.* at 546.

32. *See* W. H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 593 (1993) (discussing post-Civil War legislation that was designed to protect newly freed slaves).

interests of victims of gender-motivated violence."[33] Consequently, victims of gender-based violence have not found adequate protection under current civil rights laws.

Furthermore, legal remedies have failed at the state level because victims of gender-based crimes face formal biases in state legal systems, including biased state laws that address sexual assault, domestic violence,[34] and sexist jury instructions.[35] Even in situations where these barriers have been lifted, informal biases prevalent in state criminal justice systems still exist. These biases include traditional myths and stereotypes

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33. *Id.* at 594. For an in-depth analysis of the limitations of current civil rights legislation as applied to victims of gender-motivated crimes, see David Frazee, *An Imperfect Remedy for Imperfect Violence: The Construction of Civil Rights in the Violence Against Women Act*, 1 MICH. J. GENDER & L. 163 *passim* (1993), which suggests alternative definitions of what should constitute gender-motivated violence, and Sara E. Lesch, *A Troubled Inheritance: An Examination of Title III of the Violence Against Women Act in Light of Current Critiques of Civil Rights Law*, 3 COLUM. J. GENDER & L. 535 *passim* (1993), which examines the potential effect that current critiques of civil rights laws bear on Title III.

34. *See* Constance Frisby Fain, *Conjugal Violence: Legal and Psychosociological Remedies*, 32 SYRACUSE L. REV. 497, 529 (1981) (stating that certain state laws are only implemented when woman files for divorce, and if woman chooses not to file she is not afforded protection of these laws). Theoretically, laws imposing criminal sanctions for offenses such as assault, battery, rape, intent to commit murder, and kidnapping are laws applicable to battered women, but in reality these laws are ineffective in affording remedial alternatives. *Id.*; *see also* Malinda L. Seymore, *Against the Peace and Dignity of the State: Spousal Violence and Spousal Privilege*, 2 TEX. WESLEYAN L. REV. 239 *passim* (1995) (demonstrating ways that spousal privilege laws send message that domestic violence is private matter between two parties and not societal problem). As one commentator notes, "Full-scale, vigorous legal response to battering remains the exception and not the rule." Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 299 (1985). Courts are less likely to strictly enforce laws designed to penalize domestic violence. *Cf.* W. H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 596 (1993) (noting adoption of spousal rape laws by majority of states, but criticizing practice by 26 states according spousal rape lesser degree of criminality). Discrimination against victims of domestic abuse is reflected by the disparity in the duration of prison terms given to the victim versus her batterer. *See* Hara Estroff Marano, *Why They Stay: A Saga of Spouse Abuse*, PSYCHOL. TODAY, May 15, 1996, at 56 (indicating prison sentences for women who kill their abusers range from 14 to 18 years, while batterer's typical sentence for killing his wife ranges from two to four years), *available in* 1996 WL 9278095.

35. *Cf.* W. H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 596 (1993) (discussing formal barriers in criminal justice system that impede female victim's recovery against her batterer (citing MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN (Emlyn ed., 1847) (1680))). Hallock quotes Lord Matthew Hale's infamous jury instruction, writing that "[r]ape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent." *Id.*

about the victims of sexual violence[36] and discrimination by police officers who fail to respond seriously to private domestic altercations.[37]

Arguably, the inadequate remedies found in existing civil and criminal laws contribute to domestic violence, and exacerbate the victimization of abused women. VAWA, specifically Title III, attempts to correct this wrong. However, the question still remains whether Title III will achieve its goal of alleviating domestic violence, and whether Title III is a constitutionally permissible response to this pressing social problem.

B. *Title III of the Violence Against Women Act*

1. Purposes and Goals

Title III of the Violence Against Women Act establishes a federal civil cause of action to protect the rights of victims of gender-motivated vio-

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36. *See* S. REP. NO. 102–197, at 34 (1991) (listing instances when prejudices regarding sexual violence have affected judicial process). Until these stereotypes are obliterated, the criminal justice system will continue to pose barriers for women that it does not pose for others in society. *Id.*; *see also Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1502 (1993) (stating that history of limited legal response is in large part due to various stereotypes and misconceptions about domestic violence). The classic myths are that domestic violence is a family matter in which state officials should not interfere, that victims cause the abuse, and that victims can easily leave a toxic relationship. *Id.* at 1502–03. These "stereotypes center on blaming the victim and questioning the victim's credibility." W. H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 597 (1993).

37. *See* Peter J. Mancuso, Jr., *Domestic Violence and the Police: Theory, Policy, and Practice* (asserting that domestic violence remains difficult issue for many law enforcement officials), *in* FAMILY VIOLENCE: EMERGING ISSUES OF A NATIONAL CRISIS 127 (Leah J. Dickstein, M.D. & Carol C. Nadelson, M.D. eds., 1989). Police policy in the 1960s was to warn the batterer to "knock it off" or to advise him to "take a walk." *Id.* at 131. More recently, however, the prevailing police policy has been mandatory arrest of those suspected of committing domestic abuse. *See id.* at 141 (proclaiming "affirmative arrest" policy to be best approach in combating violence between intimates); *see also* Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 ARIZ. ST. L.J. 705, 725–26 (1989) (concluding that perpetuation of disparity of power between men and women by law enforcement officers is furthered by police practice of quickly dismissing domestic violence cases). When privacy is used to justify police inaction in wife-abuse cases, privacy becomes a rationalization to perpetuate male dominance and criminal acts. *Id.* at 726; *see also* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L & CRIMINOLOGY 46, 47 (1992) (discussing male preferential role of criminal justice system in domestic violence cases from 1970 through 1980s). Zorza documents the role of police officers from the 1970s to the late 1980s, noting that police officers "were taught to believe domestic violence was a private matter." *Id.* Police officers often considered battering calls "unglamourous, non-prestigious, and unrewarding." *See id.* (noting that between 1970 and 1990, police frequently ignored or delayed responding to domestic violence calls).

lence.[38] The enactment of VAWA creates hope that the law will become "an agent for social change."[39] In fact, by establishing this cause of action, Title III purportedly fosters public safety, health, and activities that affect interstate commerce.[40] Arguably, when women are victims of gen-

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38. *See* Violence Against Women Act, Pub. L. No. 103–322, 108 Stat. 1902–55 (codified in part at 42 U.S.C. § 13981(a) (1994)) (establishing gender-based civil rights); *see also* S. REP. NO. 103–138, at 48 (1993) (asserting that gender gap left by traditional civil rights legislation is breached by Title III's civil rights provision). It is Title III's fundamental purpose to correct the imbalance in traditional civil rights legislation by providing victims of gender-motivated violence with an effective anti-discrimination remedy for violently expressed prejudice. S. REP. NO. 102–197, at 33 (1991). *But see* Neil Gilbert, *The Wrong Response to Rape*, WALL ST. J., June 29, 1993, at A18 (contradicting findings of Judiciary Committee regarding rape statistics). Gilbert asserts that making rape a civil rights offense will lower the burden of proof and create a financial incentive to broaden the definition of rape to include sexual experiences that may be merely unpleasant. *See id.* (discussing effect of making rape lower class of offense). Gilbert further argues that VAWA promotes radical feminist movements and does not answer the feminist cries for equality. *See id.* (opining that there are better ways to spend money than furthering radical feminist agendas). Gilbert argues that equal justice is best served by improving the court system and providing increased police protection. *Id.*; *see also* Edward Grimsley, Editorial, *"Violence Against Women Act": Will Sexism Be a Federal Crime?*, RICHMOND TIMES-DISPATCH, Aug. 6, 1993, at A11 (suggesting mere sexist thoughts may constitute potential cause for conviction under new act), *available in* 1993 WL 8718317. If the Senate believes that sending a message is more important than providing "equal" legislation faithful to the Constitution, then it is Congress that is the greatest civil rights offender and every citizen is a victim. *See id.* (contending that message sent by Congress makes all citizens victims). One commentator warns that courts are leaning towards general acceptance of the "new feminist" definition of rape, which involves a presumption of guilt for the batterer. *See* Wendy McElroy, *The Unfair Sex?*, NAT'L REV., May 1, 1995, at 74 (asserting presumption of innocence no longer exists for batterers under current feminist scheme). To avoid culpability, the alleged batterer must show explicit consent given by his victim. *See id.* (noting that courts are rejecting sincere belief defense to rape).

39. Minna J. Kotkin, *The Violence Against Women Act Project: Teaching a New Generation of Public Interest Lawyers*, 4 J.L. & POL'Y 435, 436–37 (1996); *see also* Wendy Rae Willis, *The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2204 (1992) (arguing conversion of general public's belief regarding sexual violence to that of violation of civil rights as Title III's most realistic goal). Willis warns, however, that Title III is potentially fraught with the weaknesses normally associated with state criminal laws, including the requirement that complainants prove gender violence in addition to proving the sexual assault. *See id.* at 2201 (questioning efficacy of Title III).

40. Violence Against Women Act, Pub. L. No. 103–322, 108 Stat. 1902–55 (codified in part at 42 U.S.C. § 13981(a) (1994)); *see* S. REP. NO. 103–138, at 49 (1993) (analogizing crimes committed against women to crimes committed against persons of certain race); *see also* Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy, A Panel Discussion Sponsored by the Association of the Bar of the City of New York*, 4 J.L. & POL'Y 383, 398 (1996) (addressing major achievement of VAWA as advancement of society's understanding of what causes violence against women and steps needed to stop it).

der based violence, they are deterred from seeking and obtaining employment, which ultimately prevents women from participating in interstate commerce.[41]

Supporters of this civil rights remedy have articulated three goals of Title III. First, Title III is intended to send a powerful message to society that gender-motivated violence offends the nation's ideal of equality.[42] Second, Title III is intended to place gender-motivated crimes in line with other bias-based crimes.[43] Finally, Title III attempts to provide a federal remedy to victims of gender-motivated violence, a remedy currently not available under state law.[44]

2. Title III Provisions

Title III articulates its goals in four relevant subsections, providing that:

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41. *See* S. REP. NO. 103–138, at 54 (1993) (reporting effects gender-motivated crimes have on interstate commerce).

42. S. REP. NO. 103–138, at 44 (1993); *see* S. REP. NO. 102–197, at 33 (1991) (discussing goals of Title III, including goal of raising society's awareness of violent crimes motivated by gender). The Judiciary Committee further stated that Title III's fundamental purpose is to provide victims of gender-motivated crimes with an effective "anti-discrimination remedy." *Id.*; *see also* S. REP. NO. 101–545, at 41–42 (1990) (recognizing intolerance for discrimination directed towards victims of gender violence as one of Title III's goals). The Judiciary Committee declared that VAWA was designed to treat crimes "overwhelmingly motivated" by gender as crimes in "violation of the victim's civil rights." *Id.* at 40; *see also* Peggy O'Crowley, *Roots of Abuse Run Deep "Change Not Only Legal System, But People's Hearts and Souls" Series: Battered Lives—The Domestic Violence Crises*, THE RECORD (N. N.J.), Nov. 15, 1993, at A1 (advocating need for change in cultural attitudes, as well as legal attitudes, to eradicate domestic violence), *available in* 1993 WL 7906555.

43. *See* S. REP. NO. 102–197, at 42 (1991) (noting that "[m]ore recent legislation has not filled the 'gender gap' left by traditional anti-bias" laws). Almost every state has passed laws that provide for civil and criminal remedies to victims of hate crimes; however, few of these laws originally covered gender bias crimes. *Id.*; *see also* S. REP. NO. 103–138, at 48 (1993) (noting Title III's attempt to consider crimes motivated by gender as serious as other bias crimes).

44. Violence Against Women Act, Pub. L. No. 103–322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981(a) (1994)); *see* S. REP. NO. 103–138, at 44 (1993) (noting Title III's recognition that state remedies are inadequate to address violent, gender-based discrimination). Victims of gender-motivated crimes must often face an unreceptive and biased criminal justice system. *See* S. REP NO. 103–138, at 44–45; W. H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 595 (1993) (detailing biases in criminal justice system and society). Victims often have to overcome formal barriers in the form of "biased state laws dealing with sexual assault." *Id.* For instance, Hallock notes that it was not until the passing of the last decade that laws outlawing spousal rape were enacted. *Id.* at 596.

all United States residents have the right to be free from violent, gender-motivated crimes;[45] violators will be subject to liability to the injured party in the form of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as the court deems appropriate;[46] a crime of violence motivated by gender is defined as a bias crime and crime of violence is defined as a felonious act;[47] and limitations exist regarding the scope and jurisdiction.[48]

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45. Violence Against Women Act, Pub. L. No. 103–322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981(b) (1994)). This provision, entitled *Right To Be Free From Crimes Of Violence*, provides that "all persons within the United States shall have the right to be free from crimes of violence motivated by gender." *Id.*; *see also* Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994, at 18 (discussing effect of O.J. Simpson's criminal trial on rise in awareness of domestic violence). Women's groups used the Simpson controversy as a "springboard" to educate society about domestic violence. *See id.* (comparing Simpson and Anita Hill situations and showing how they raise awareness). This heightened awareness may support laws already in existence, providing prosecutors with the incentive to pursue batterers. *See id.* at 19 (opining how increased awareness led to increased enforcement of existing laws); *see also Too Much of It Around: Domestic Violence*, ECONOMIST, July 16, 1994, at 25 (describing situations in which fight against domestic violence was helped by Simpson criminal trial). For example, in Los Angeles, battered women's shelters have incurred an influx of calls and applications for rape counseling, while in New York the legislature unanimously passed a mandatory arrest policy for those who commit domestic violence. *Id.*

46. Violence Against Women Act, Pub. L. No. 103–322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981(c) (1994)). This provision is entitled *Cause of Action* and states:

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

Id.; *cf.* Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994, at 18 (discerning few factors that may cause batterers to batter). Some researchers believe a physiological factor present in a batterer's physique causes him to abuse. *See id.* (disclosing results of study conducted by University of Massachusetts Medical Center, finding that 61 percent of husbands who batter their wives have signs of severe head trauma). Smolowe also distinguished between two types of batterers: the batterer who cannot control his impulses, and the one who is calculated and manipulative. *See id.* (asserting that manipulative batterer is more dangerous due to aggressive character).

47. Violence Against Women Act, Pub. L. No. 103–322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981(d) (1994)).

This provision sets forth the definitions relevant to this section. For the purposes of this section,

> (1) [T]he term "crime of violence motivated by gender" means 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; and
>
> (2) the term "crime of violence" means:

3. Redressing Failures of Existing Legal Remedies

Ostensibly, Title III was enacted to address key failures in current remedies provided by civil rights legislation and state legislation regarding gender-motivated crimes.[49] Because traditional civil remedies against violent acts of discrimination have not been available to victims of gender-based crimes, Title III attempts to rectify this situation by specifically providing a civil rights remedy for the victims of these crimes.[50]

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States, and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

Id.

48. *Id.* at 1941–42 (codified at 42 U.S.C. § 13981(e) (1994)). This provision is entitled *Limitation and Procedures* and states:

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender . . .

(2) No Prior Criminal Action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section. Sections (3) and (4) omitted.

Id.

49. S. REP. NO. 102–197, at 42 (1991).

50. *See id.* (discussing fundamental purpose of Title III is to create effective anti-discrimination remedy for gender-motivated violence). Because nearly every state has increased its criminal penalties and provided more civil remedies for hate crimes over the last 10 years, Title III has also been construed to place gender-based hate crimes on the same level as other hate crimes. *Id.* Essentially, the results are the same for victims of crimes, whether the crime was motivated by ethnicity, race, or gender. *Id.* The victims are reduced to symbols of group hatred, of which they have no individual power to change. *Id.* To place this type of violence within the context of civil rights legislation recognizes the crime for what it is—a hate crime. *Id.*; *see also* Martha Burk, *War, Rape, and Our Culture of Violence*, USA TODAY, Jan. 12, 1993, at 13A (advocating declaration of rape as both war crime and hate crime); Constance Morella, *It's No Fun When Violence Becomes a Game*, CHI. TRIB., June 20, 1993, at 11 (asserting that women are terrorized because of their gender, and that this terror constitutes discrimination); *cf.* Robert Keith Smith, *Violence Against Man Is Also Crime*, CHARLESTON GAZETTE, Apr. 29, 1995, at 4A (arguing VAWA legislates sexual inequality because Act does not consider violence against men to be hate crime or violation of men's civil rights), *available in* 1995 WL 11438288; Cathy Young, *Act Stirs Up Debate on Crime and Gender*, INSIGHT, Nov. 23, 1993, at 4 (analyzing effect and

Additionally, because existing state remedies have proven to be insufficient or inadequate to protect women against domestic violence,[51] Title III provides a federal forum in which victims of these felonious crimes are free from any constraints state remedies may present. For example, a federal forum grants an environment free of antiquated state laws and local immunities.[52] Unlike the federal forum, many states require rape victims to overcome local prejudice and barriers of proof.[53] In fact, under certain circumstances, tort immunities and marital exclusions bar a victim from bringing suit altogether.[54] By providing an equitable federal forum, Title III attempts to remove one of numerous obstacles blocking a female victim's path to an adequate remedy.

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necessity for VAWA's civil rights provision), *available in* 1993 WL 7511979. Young argues that it is erroneous to create a gender bias category parallel to race bias crimes because the dynamics of each category are different. *Id.* Specifically, hate crimes are different than other crimes because presumably they would not have occurred but for the race, ethnicity, or religion of the individual assaulted. *Id.* However, a gender-based crime may occur regardless of the person's gender. *Id.*

51. *See* S. REP. NO. 103–138, at 48 (1993) (noting ways in which state laws fail to address crimes motivated by gender). Traditional state laws have failed in redressing some of the most serious crimes against women. *Id.* Studies show that crimes which disproportionately affect women are often treated with less attention than comparable crimes affecting both women and men. *Id.*; *see also* S. REP. NO. 102–197, at 43 (1991) (recognizing barriers in law and in practice faced by women, which are not shared by other victims). State remedies fail partly because legal rules and practices place the victims on trial. *Id.* As a result, many victims choose to remain silent about the assault. *Id.*

52. *See* S. REP. NO. 102–197, at 53 (1991) (identifying formal and informal barriers in state legal systems which hamper women's ability to receive redress for assaults). Federal forums are also preferred because the Federal Rules of Evidence help protect against the use of improper stereotypes. *Id.* at 57. Moreover, federal forums are favored over state forums due to the belief that federal judges and juries are, to a greater extent, better insulated from local pressures that often put the victim on trial. *Id.* at 58; *see also* S. REP. NO. 101–545, at 42 (1990) (declaring Title III offers victims "best court system" in world). Federal judges are insulated from local political pressures, and jurors who harbor irrational prejudices are believed to be "screened out" in federal courts. *Id. But see* Wendy Rae Willis, Note, *The Gun Is Always Pointed: Sexual Violence and Title III of Violence Against Women Act*, 80 GEO. L.J. 2197, 2201 (1992) (asserting Title III, as written, is not answer to domestic violence). Willis argues that Title III must be amended to avoid recreating the errors and omissions of state criminal laws. *Id.* Willis further alleges that one of Title III's weaknesses stems from its failure to acknowledge that the majority of sexual assaults are gender motivated. *Id.* By requiring the plaintiff "to produce external evidence beyond" the actual assault, Willis asserts that Title III will exclude many of the victims it was enacted to help. *Id.* at 2205; *see also Getting Real on Crime*, DETROIT NEWS, Nov. 16, 1993, at 8A (contending federal tort remedy is not answer for rape), *available in* 1993 WL 6059444. A federal tort remedy does not carry any deterrent value not already in existence in most states. *Id.* Furthermore, there is no conceivable advantage in treating sexual assault as a discriminatory act as opposed to one of extreme violence. *Id.*

53. S. REP. NO. 102–197, at 53 (1991).

54. *Id.* at 54.

III. The Constitutional Question

A. *The Controversial Split*

While Title III provides a remedy for battered women, there is speculation as to whether this legislative act is constitutional. Two cases decided in 1996 produced contrary rulings regarding the constitutionality of Title III of The Violence Against Women Act, leaving the effect and applicability of the Act uncertain.

1. *Doe v. Doe*

In *Doe v. Doe*,[55] the United States District Court for the District of Connecticut held Title III of VAWA to be "a permissible constitutional exercise of congressional authority under the Commerce Clause."[56] *Doe* involved a plaintiff-wife, Jane Doe, who sought to avail herself of Title III's civil rights remedy.[57] Mrs. Doe alleged that her husband, John Doe, had mentally and physically abused her from 1978 through 1995.[58] Mrs. Doe alleged that she was subjected to abuse, including being thrown onto the floor, having sharp and dangerous objects thrown at her, being threatened, having her property destroyed, and being subjected to extreme emotional distress.[59] John Doe, invoking the Supreme Court's

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55. 929 F. Supp. 608 (D. Conn. 1996).

56. *Doe*, 929 F. Supp. at 617.

57. *Id.* at 610. Jane Doe sought damages for the deprivation of her federal right, under Title III, to be free from her husband's gender-motivated violence. *Id.*

58. *Id.* According to a study conducted by Strauss, Gillis, and Steinmetz on domestic violence, many husbands and wives view the marriage license as a license for domestic abuse. *See* Nancy Hutchings, The Violent Family: Victimization of Women, Children and Elders 17–18 (1988) (indicating that violence is learned at home and may result in subsequent violent reactions in adult years). Hutchings indicates that over 75% of parents approve of various forms of violence as legitimate methods of punishment. *Id.* A study conducted on 46 million children from the 1975 census found that approximately three to four million children were "kicked, bitten or punched" by a parent at least once in their lifetime. *Id.* Hutchings further acknowledges that the problem of battering occurs within every socioeconomic group. *Id.* at 73. The psychological characteristics most typically exhibited by a battered woman include fear, low self-esteem, and a strong sense of responsibility for her situation. *Id.* Men who batter women tend to demonstrate pathological jealousy, limited coping ability, and low self-esteem. *Id.* at 75. Moreover, 11–52% of all assaults take place within the family. Lewis Okun, Women Abuse: Facts Replacing Myths 35 (1986).

59. *Doe*, 929 F. Supp. at 610. One author notes that verbal abuse is almost always present in violent relationships. Lewis Okun, Women Abuse: Facts Replacing Myths 50 (1986). Other forms of battering often present in abusive relationships include being punched, pushed, thrown down, kicked, smothered, strangled, and the use of blunt instruments as weapons. *Id.* Okun further recognizes marital rape as another form of battering incurred by wives, noting that approximately one-third of the women studied did not believe they had the right to refuse sexual demands made by their mates. *Id.* at 52.

landmark ruling in *Lopez*, challenged Title III's constitutionality under both the Commerce Clause and the Fourteenth Amendment.[60] Applying a rational basis test, the court concluded that: (1) a rational basis existed for finding that domestic violence sufficiently affected interstate commerce, and (2) Title III was reasonably adapted to achieve this permitted end.[61]

In determining Title III's constitutionality, the court considered congressional findings and reports, deciding that these materials demonstrated the substantial effect gender-based violence had on interstate commerce.[62] Specifically, the court held that: (1) Congress found existing state and federal criminal laws to be inadequate protection for victims of gender-motivated violence,[63] and (2) the Supreme Court

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60. *Doe*, 929 F. Supp. at 610, 612. The government, along with a group of non-profit organizations advocating on behalf of women victims of gender-motivated crimes, intervened and defended the constitutionality of Title III. *Id.* at 610. The court ruled that defendant's claims of unconstitutionality were unfounded because violence has a "substantial impact on interstate commerce and thus [Title III is] a proper exercise of congressional power under the Commerce Clause." *Id.*

61. *Id.* at 617. This holding is not without its critics. *See* David E. Rovella, *He Rules, She Rules on Violence Law*, NAT'L L.J., Aug. 12, 1996, at A8 (noting criticisms of *Doe* opinion). Rovella cites Judy Beckner Sloan, a professor at Southwestern University School of Law, as stating that the *Doe* opinion was based on a "dangerously weak argument" and that in *United States v. Lopez*, there was at least a gun that could be connected with interstate commerce. *Id.*

62. *Doe*, 929 F. Supp. at 613–14. Although the court noted that the determination of whether an activity "substantially affects interstate commerce" is a judicial, not a legislative function, the court relied heavily on the legislative findings because Congress relied on an "extensive compilation of data, testimony, and reports." *Id.* Thus, the court was not left to "speculate" as to the affect of the law on interstate commerce. *Id.* The evidence clearly depicted a connection between domestic violence and interstate commerce. *Id.*; *see also* S. REP. NO. 103–138, at 54 (1993) (studying impact of gender-based crimes on interstate commerce). The Judiciary Committee argued that:

> Gender-based crimes and the fear of gender-based crimes restrict movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full particularly [sic] in the national economy. For example, studies report that almost fifty percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.

Id.

63. *Doe*, 929 F. Supp. at 616; *see* S. REP. NO. 103–138, at 49 (1993) (finding existing state remedies inadequate to address gender-motivated crimes). Traditionally, state laws have proven to be difficult avenues of redress for female victims of serious crimes. *Id.*; *see also* S. REP. NO. 102–197, at 43 (1991) (reporting deficiencies in existing state remedies). State remedies available to victims of gender-motivated crimes fail, at least in part, due to the rules and practices available that tend to place suspicion on the victim. *Id.* at 44. The rules and practices listed by the Judiciary Committee include: police beginning their inves-

previously recognized that bias-inspired crimes inflicted a harm to society greater than that inflicted upon the individual victim.[64] Given these findings, the court ruled that the congressional plan to create a federal civil rights remedy was reasonably adapted to further this constitutionally permitted end.[65]

2. *Brzonkala v. Virginia Polytechnic & State University*

However, in *Brzonkala v. Virginia Polytechnic & State University*,[66] the United States District Court for the Western District of Virginia held Title III an unconstitutional exercise of Congress's powers under both the Commerce Clause and the Fourteenth Amendment.[67] *Brzonkala* involved a female student athlete at Virginia Polytechnic Institute (VPI) who alleged that she was raped by the defendants, Morrison and Crawford, members of VPI's all-male football team.[68] On the evening of September 21, 1994, and continuing through the following morning, Brzonkala was repeatedly raped in her dormitory room.[69] The identities

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tigation by demanding a polygraph exam of the victim; defense counsel asserting the victim's emotional imbalance; and judges warning juries to view the victim's sworn testimony with a degree of apprehension. *See id.* (asserting that legal system views victims of gender-motivated violence with more trepidation than victims of barroom brawls); S. REP. NO. 101–545, at 41 (1990) (distinguishing difference between Title III's federal remedy and state criminal remedies). Criminal laws are designed to avenge the state's interest in providing safety and protection to its citizens; Title III, on the other hand, was created to vindicate the victim's interest in equality. *Id.*

64. *Doe*, 929 F. Supp. at 616–17 (citing Wisconsin v. Mitchell, 508 U.S. 476 (1993)); *see also* S. REP. NO. 103–138, at 49 (1993) (documenting harm caused to society as whole by bias crimes). Title III's civil remedy has the additional function of providing a societal judgement against gender-bias crimes. S. REP NO. 103–138, at 49–50 (1993). The Supreme Court in *Mitchell* recognized that bias crimes tend to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. *Doe*, 929 F. Supp. at 616–17; *see also* S. REP. NO. 103–138, at 49–50 (1993) (citing Title III's importance in movement to raise society's moral conscience regarding gender-motivated violence).

65. *Doe*, 929 F. Supp. at 617.

66. 935 F. Supp. 779 (W.D. Va. 1996).

67. *Brzonkala*, 935 F. Supp. at 801.

68. *Id.* at 781. Brzonkala resided in Fairfax, Virginia and attended Virginia Polytechnic Institute (VPI). *Id.*; *see also Civil Rape Case Challenges Culture of College Athletics*, ARIZ. REPUBLIC, Feb. 11, 1996, at A3 (reporting rise in racial crosscurrents caused by racial difference of parties), *available in* 1996 WL 7686604. Brzonkala is a white female from an upper-middle class family; Morrison and Crawford are black males attending VPI on football scholarships. *Id.*

69. *Brzonkala*, 935 F. Supp. at 781. Brzonkala met her assailants less than a half-hour prior to the assault and knew them only by their first names and by their status as football players. *Id.* Brzonkala alleged that the defendants forced her to submit to sexual intercourse by pinning her arms and legs beneath the weight of their bodies. *Id.* After the alleged rape, plaintiff asserted that Morrison said to her, "You better not have any fucking disease." *Id.*; *see* Richard Jerome et al., *No Justice, No Peace: Both Sides Lose When Vir-*

of her assailants remained unknown until February 1995, when Brzonkala identified Morrison and Crawford as the two men who assaulted her.[70] Prior to this identification, Morrison had publicly announced his propensity to intoxicate women and force them to have intercourse with him.[71] On March 1, 1996, Brzonkala filed a complaint against the two men, alleging violations of Title III of the Violence Against Women Act.[72]

In determining the constitutionality of VAWA, the *Brzonkala* court analyzed and applied the conclusions reached by the Supreme Court in *Lopez*. The court stated that the effects analysis in *Lopez* can be broken

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ginia Tech Tries to Settle a Rape Charge on Its Own, in Secret, PEOPLE, Mar. 11, 1996, at 42 (discussing opposing sides of suit). Brzonkala and a friend were returning to their dormitory when they heard a whistle in the dark. *Id.* It was Morrison and Crawford who whistled and Brzonkala and her friend responded by walking over to them. *Id.* After small talk degenerated into lewd innuendos and blatant suggestions, Brzonkala's friend left the company; Brzonkala, however, remained. *Id.* at 43. Although her memory was vague, Brzonkala accused both Morrison and Crawford of sexually assaulting her. *Id.* Morrison countered this claim by alleging that Brzonkala consented to the sexual encounter and Crawford denied any contact with Brzonkala and produced a witness who provided him with an alibi. *See id.* (reporting disparity in parties' stories).

70. *Brzonkala*, 935 F. Supp. at 782.

71. *Id.* Morrison made his announcement in the dormitory's dining hall, declaring, "I like to get girls drunk and fuck the shit out of them." *Id.*

72. *Id.* Prior to filing a complaint under Title III, Brzonkala filed a complaint against the defendants under VPI's Sexual Assault Policy. *Id.* In the first hearing with VPI's Judicial Committee, Morrison admitted that he forced sexual contact with Brzonkala despite her rejection of his advances. *See id.* (noting Crawford's confirmation of Morrison's sexual contact with Brzonkala and simultaneous denial of his own involvement in assault). The VPI Judicial Committee found Morrison guilty of sexual assault and he was suspended from school for two semesters. *See id.* (heeding Judiciary Committee's finding of insufficient evidence to act against Crawford). Morrison appealed the decision but on second hearing the second judicial committee upheld the initial sanctions. Nonetheless, Morrison appealed yet again. *Id.* The second appeal, however, was decided in favor of Morrison, and without notice to Brzonkala, VPI dismissed the sanctions imposed on Morrison and permitted him to return to school in the Fall 1995 semester. *Id.* Fearing for her personal safety, Brzonkala withdrew from VPI in the same semester. *Id.*; *see* Richard Jerome et al., *No Justice, No Peace: Both Sides Lose When Virginia Tech Tries to Settle a Rape Charge on Its Own, in Secret*, PEOPLE, Mar. 11, 1996, at 44 (reporting financial details of Brzonkala's suit). Brzonkala filed an $8.3 million federal lawsuit against Crawford, Morrison, and VPI. *Id.* The damage claim was symbolic and representative of the $8.3 million that VPI received for its appearance in the 1995 Sugar Bowl. *Id.* The suit also sought to prevent VPI from privately adjudicating future sexual assaults. *See id.* (discussing practice of many colleges to adjudicate crimes that occur on college campuses). Jerome notes that college administrations across the nation normally report to local law enforcement the felonies reported to them; however, sexual assault-based crimes within the school structure are solely internal matters adjudicated through administrative hearings by deans and staff members acting as judge and jury. *Id.* Jerome criticizes these procedures for their secretive and private nature. *Id.*

down into four main parts.[73] First, the district court found that *Lopez* distinguished the Commerce Clause analysis between situations where the regulated activity is economic in nature and where it is noneconomic.[74] Because Title III attempts to regulate a noneconomic activity, the *Brzonkala* court looked to other factors to determine Title III's constitutionality.[75] Second, the court explained that *Lopez* considered whether the act had any jurisdictional element to ensure that the regulated activity would affect interstate commerce.[76] The court opined that VAWA did not have such a requirement.[77] Although the *Brzonkala* court did not go so far as to hold this a fatal flaw, it did state that "[a]lthough it is unclear whether such a jurisdictional requirement is needed, indications exist that such a requirement may be necessary."[78] Third, although *Lopez* considered the importance of legislative history, the *Brzonkala* court concluded that such findings were not necessary.[79] Finally, the court found that under *Lopez*, the Supreme Court considered the practical implications of simply accepting the government's assertions that the economic impact of the regulated activity affected interstate commerce to such an extent as to sustain the regulation.[80] Consequently, the *Brzonkala* court reasoned that an activity's effect on the national economy is not equivalent to the requisite effect on interstate commerce,

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73. *Brzonkala*, 935 F. Supp. at 786.

74. *Id.* at 787. After *Lopez*, precedent that involved situations where regulated intrastate activities were economic in nature were no longer controlling in situations where the regulated intrastate activity was not economic. *Id.* At a minimum, *Lopez* stated that an intrastate activity's economic or noneconomic nature would be a relevant consideration. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 792.

78. *Brzonkala*, 935 F. Supp. at 792. The court noted that Congress often placed such a requirement in legislation similar to VAWA. *Id.*

79. *Id.* at 790. The court stated that the *Lopez* Court had the benefit of congressional findings, however, such findings were not necessary for a determination of whether an activity had the requisite rational relation to interstate commerce to legitimize its regulation. *Id.*

80. *Id.* at 792. The court ruled that VAWA was an unconstitutional exercise of the Commerce power because it "would have the practical result of excessively extending Congress's power and . . . inappropriately tipping the balance away from the states." *Id.* A reasonable inference from the congressional findings was that gender-based violence directed towards women had a substantial impact on the national economy. *Id.* However, the court warned that just showing that something had an effect on the national economy was not enough to show the necessary substantial effect on interstate commerce. *See id.* (warning existence of chain of causation simply not enough to satisfy Commerce Clause legitimacy test). The court made a further analogy to insomnia: insomnia has some effect on interstate travel, but to extend Congress's powers to this issue would unreasonably tip the balance away from the states. *Id.* at 793.

and Congress's arguments asserting this correlation would imply a commerce power without limitations.[81] After reviewing *Lopez*, the *Brzonkala* court concluded that "reasonable adherence" to *Lopez* leads to the finding that VAWA is not a proper exercise of Congress's commerce power.[82]

The *Brzonkala* court next analyzed VAWA's constitutionality under the Fourteenth Amendment. The court stated that in order to invoke the protections afforded under Section One of the Fourteenth Amendment, a victim must show that the state has deprived her of equal protection of the laws.[83] Since VAWA was enacted to address an individual's criminal acts, not state acts, the *Brzonkala* court concluded that Section One was inapplicable.[84] The court next examined Section Five of the Fourteenth Amendment to determine whether Congress had derived its constitutional authority to enact VAWA under this section.[85] Although conceding that Congress's powers under the Fourteenth Amendment are broad, the court warned that "Congress's acts must have some reasonable possibility of addressing a legitimate equal protection concern" and the means used to address this end must be appropriate in order to survive a Fourteenth Amendment challenge.[86] Acting within these guidelines, the court reasoned that VAWA did not implicate the states as the real perpetrators

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81. *Id.*

82. *Id.*

83. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

84. *Brzonkala*, 935 F. Supp. at 794; *see* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 352–55 (1993) (O'Connor, J., dissenting) (emphasizing necessity for state action requirement under Section One of Fourteenth Amendment). Justice O'Connor stated that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Id.*

85. U.S. CONST. amend. XIV, § 5. The Fourteenth Amendment provides, in pertinent part that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

86. *Brzonkala*, 935 F. Supp. at 796. In order for Congress to act under Section Five of the Fourteenth Amendment, Congress must show a purpose legitimate under the Fourteenth Amendment, and the means chosen must be appropriate. *Id.* The court addressed the purposes articulated by supporters of VAWA: (1) the goal of remedying private individual violence; and (2) the goal of remedying deficiencies in state criminal justice systems. *Id.* at 797, 800. As for the former, the court found this to be an illegitimate equal protection goal. *Id.* at 799–800. As to the latter, the court concluded that a legitimate equal protection concern existed within state criminal justice systems that discriminate against victims of gender-motivated crimes. *Id.* at 800. The court then proceeded to examine the means chosen to remedy these deficiencies and concluded that VAWA does not address the equal protection concern. *See id.* at 801 (declaring VAWA ineffective in undoing or stopping specific equal protection violations by compensating victims for violations, or by punishing violator).

of equal protection violations, as Section One requires.[87] Consequently, VAWA did nothing to alleviate future potential Fourteenth Amendment violations, which may occur in state criminal justice systems, and is thus not appropriate legislation under Section Five.[88] The court concluded its Fourteenth Amendment analysis by holding VAWA unconstitutional under both Section One and Section Five of that amendment.[89]

B. *Commerce Clause Analysis*

1. Historical Overview of Congress's Commerce Clause Powers

The Constitution grants Congress the power to "regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes."[90] The Commerce Clause was enacted to eradicate hostile state restrictions and retaliatory trade regulations between the states—in essence, the congressional power was designed to promote a national market and to curb the balkanization of the national economy.[91]

The Supreme Court first attempted to articulate the scope and limits of the commerce power in the early part of the nineteenth century. In *Gibbons v. Ogden*,[92] Chief Justice John Marshall defined commerce as something more than traffic; he identified it as commercial intercourse between the states and between the nations.[93] Thus, Marshall held that

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87. *Id.* at 801.
88. *Id.*
89. *Id.*
90. U.S. CONST. art. I, § 8, cl. 3.
91. *See* THE FEDERALIST NO. 22, at 136 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing for establishment of federal government to promote national market and economic uniformity among states). Hamilton declared: "It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance that more strongly demands a [federal] superintendence." *Id.* Hamilton asserts that the absence of a federal government had operated as a bar to the formation of beneficial treaties with foreign nations and had enabled dissatisfaction between the states. *Id.* He posited that from the gradual conflicts of state regulations, it can be reasonably expected that the citizens of one state would come to consider and treat the citizens of the other states as foreigners and aliens. *Id.* at 137; *see also* GERALD GUNTHER, CONSTITUTIONAL LAW 94 (12th ed. 1991) (providing abbreviated history of Commerce Clause enactment).
92. 22 U.S. (9 Wheat.) 1 (1824).
93. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (deciding that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse"). Chief Justice Marshall continued, noting that commerce describes the "commercial intercourse between the nations, and parts of nations, in all its branches . . . ." *Id.* The subject to which the power is applied, moreover, is commerce "among the several states." *Id.* at 194. Marshall interpreted "among" to mean "intermingled with." *Id.* Thus, commerce among the states is interpreted to mean commerce that concerns more than one state, whereas commerce among the nations is to be applied to all the external concerns of the nation. *Id.* at 194–95.

the commerce power is the power to regulate "commerce which concerns more states than one."[94] As such, this power may be exercised to its utmost extent and is limited only by the provisions of the Constitution.[95]

After *Gibbons*, the extent of Congress's commerce power remained mostly unchallenged until the late nineteenth century when Congress enacted the Interstate Commerce Act of 1887,[96] which attempted to regulate the rates railroads were allowed to charge for interstate travel,[97] and the Sherman Anti-Trust Act of 1890, which sought to regulate the formation and operation of monopolies.[98] Because both acts extended congressional commerce power, the ensuing legal challenges spurred major confrontations between the Supreme Court and Congress regarding the extent of Congress's authority over commerce.[99]

Over time, the Supreme Court developed two approaches to determine the constitutionality of congressional acts: the formalistic approach and the realistic approach. The formalistic approach, popular prior to 1936,[100] was characterized by political conservativism, judicial activism, and categorical labels.[101] The Court's 1895 decision in *United States v. E.C. Knight Co.*[102] exemplifies the application of the formalistic approach.

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94. *Id.* at 189. Because the power involves regulation, it is the power "to prescribe the rule by which commerce is to be governed." *Id.* at 196.

95. *See id.* (defining scope of commerce clause regulation). If the sovereignty of Congress is plenary as to a particular object, this power is vested in Congress absolutely and is only restricted by the Constitution. *Id.*; *see also* THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) (noting limitations placed on federal government by proposed Constitution). The proposed Constitution delegated limited powers to the federal government and left numerous and indefinite powers to the state. *See id.* (arguing merits of federalism). These divisions of authority ensure the protection of fundamental liberties. *See id.* (declaring federalism only appropriate alternative to ensure inherent rights).

96. GERALD GUNTHER, CONSTITUTIONAL LAW 97 (12th ed. 1991).

97. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. § 1 (1976)).

98. Sherman Act, ch. 647, §§ 1–7, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7 (1976)).

99. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 98 (12th ed. 1991) (noting conflict over Congress's attempts to enact legislation under Commerce Clause).

100. *Id.* at 99–102 (tracing history of formalistic method of interpreting constitutionality of congressional acts allegedly authorized by Commerce Clause). Categorizing a congressional act as having either a direct or indirect effect on interstate commerce constituted the formalistic method of interpreting the constitutionality of such an act. *Id.* Only if the Court determined that the act had a direct effect on interstate commerce, would it hold the act a constitutional exercise of Congress's commerce power. *Id.*

101. *Cf. id.* at 101–02 (discussing different approaches to addressing economic regulation of pre–1937 era).

102. 156 U.S. 1 (1895).

In *E.C. Knight*, the Supreme Court determined that the Sherman Anti-Trust Act could not be used to set aside American Sugar Refining Company's acquisition of the stock of four other sugar refineries.[103] The Court held that the nexus between the local activity and interstate commerce was a qualitative one of logical relationships.[104] According to the Court, the nexus at issue was non-existent since manufacturing had merely an indirect effect on interstate commerce.[105] Consequently, the Court concluded that activities involving manufacturing were too remote for Congress to reach under the Commerce Clause.[106] These distinctions between manufacturing and commerce and direct versus indirect effects were the driving forces behind the Court's decision.[107]

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103. *See* United States v. E.C. Knight Co., 156 U.S. 1, 16–17 (1895) (holding application of Sherman Anti-Trust Act inappropriate as applied to American Sugar Refining Company). The complaint alleged that American Sugar Refining Company (American Sugar), in order to obtain complete control of United States sugar prices, entered into an unlawful and fraudulent scheme to purchase the stock of four other sugar manufacturers. *Id.* at 2–3. American Sugar desired control over all sugar refineries in order to restrain trade and consequently prices. *Id.* The government argued that American Sugar's acquisition of the other four sugar refineries gave American Sugar control of 98% of the nation's sugar refining capacity. *Id.*

104. *See id.* at 14 (determining constitutional authority based on classification of activity). The Court's decision was premised on confining constitutional doctrines—the view that Congress could not, under the Commerce Clause, reach a monopoly in "manufacture." *See id.* (distinguishing between manufacture and commerce in determining grounds for constitutional support). Manufacture is equivalent to transformation; that is, "the fashioning of raw materials into a change of form for use." *Id.* To the contrary, the functions of commerce include "buying and selling and the transportation incidental thereto." *Id.* The Court reasoned that if commerce was to be interpreted to include manufacturing, Congress would then be able to reach all industries that contemplate manufacturing goods intended to be the object of commercial transactions. *Id.*

105. *Id.* at 16-17. The Court stated that although the conspiracy to dominate domestic manufacturing enterprise might restrain external trade in addition to domestic trade, this restraint would be indirect and as such would not necessarily determine the purpose of the conspiracy. *Id.* Thus, the challenged action related solely to the acquisition of four major refineries and bore no direct connection to commerce among the states. *Id.* at 17.

106. *Id.*

107. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 101 (12th ed. 1991) (noting that *Knight* was "major obstacle to national economic regulation[s]," but not death-knell for Congress's commerce power); *see also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 212 (1899) (holding valid government action against six companies manufacturing iron pipe who conspired with each other to restrain competition). In *Addyston*, the Court found that the aim of the parties' agreement was to restrain manufacturing and thus increase prices. *Id.* This amounted to a direct restraint upon interstate commerce. *Id.* Moreover, in reaching this decision, the Court determined that there is no express limitation of Congress's power with regard to legislating those private agreements that would directly and substantially affect interstate commerce. *Id.* at 229.

Although the formalistic approach was used concurrently with the realistic approach, the latter became pervasive after 1936.[108] The realistic approach was characterized by judicial restraint and emphasized an analysis of the nexus between intrastate, or local activities, and interstate commerce.[109] Under this method of analysis, the Supreme Court often found congressional acts constitutional, sustaining laws because of the physical or economic effects the intrastate activities had on interstate commerce.[110] For instance, in *Houston E & W Texas Railway Co. v. United States*[111] (The "Shreveport Rate Case"), the Court sustained Congress's authority to regulate intrastate railroad rates that discriminated against interstate railroad traffic.[112] The Court held that congressional

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108. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 99–106 (12th ed. 1991) (tracing history of formalistic and realistic approaches to constitutional interpretation of congressional acts). Franklin Delano Roosevelt's Court Packing Plan in the 1930s marked the change in the way the Supreme Court ruled on congressional actions regarding local activities. *Id.* at 115. FDR assumed office in 1933 during the Great Depression. *Id.* FDR's response to this economic crisis was an unprecedented flow of congressional acts. *Id.* Many of these "New Deal" measures were based on the commerce power; for example, the National Industrial Recovery Act of 1933 and the Bituminous Coal Conservation Act of 1935. *Id.* at 116–22. These acts were held unconstitutional in, respectively, *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *Id.* at 117, 121. These decisions convinced the Roosevelt administration that something must be done about the Court in order to save the New Deal. *Id.* at 122. In 1937, President Roosevelt proposed changes to the structure of the Supreme Court. *Id.* This plan purported to add more justices, one for each existing justice over seventy-five years in age. *Id.* It was summarily rejected by the Senate on June 14, 1937. *Id.* at 123. The effect of FDR's "Court-Packing" plan on the Supreme Court's view of Congress's powers under the Commerce Clause is unclear. *Id.* at 124. However, after FDR's attempt to realign the Court, the Court began to base their decisions regarding congressional authority to regulate local activities on a broader scope. *Id.* Categories such as "direct" and "indirect" became obsolete. *Id.* Rather, the Court looked to the degree of relationship between the local activity and interstate commerce. *Id.*

109. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 102 (12th ed. 1991) (delineating development of alternative analysis of necessary nexus to justify congressional regulation of local affairs under commerce power). The railroad forum was the most prolific origin for this alternative analysis. *Id.* This option emphasized the practical and quantitative, rather than the qualitative relationship between what is perceived as local and interstate. *Id.*

110. *See id.* (noting how majority of early congressional attempts to regulate railroads withstood constitutional attack).

111. 234 U.S. 342 (1914).

112. *See* Houston E & W Tex. Ry. Co. v. United States, 234 U.S. 342, 344, 360 (1914) (holding congressional attempt to regulate local activity constitutional). The railroad carriers had set rates from points within Texas much lower than those set for travel from Shreveport to Texas. *Id.* at 346. Shreveport, Louisiana is located approximately forty miles from the Texas border; it competes with Houston and Dallas for the business of the intervening territory. *See id.* (finding difference in rates substantial and injurious to commerce of Shreveport). The Interstate Commerce Commission determined that the rates

authority extended to intrastate carriers because these carriers were instruments of interstate commerce.[113] Thus, congressional authority necessarily "embrace[d] the right to control [the railroads'] operations in all matters having such a close and substantial relation to interstate traffic."[114] The Court further concluded that when interstate and intrastate economic affairs are so related that the government of one involves the control of the other, Congress is supreme and is entitled to prescribe the final rule.[115] Thus, the realistic approach emphasized the study of the nexus between local activities and interstate commerce; if that nexus proved to be close and interrelated, the Court would uphold the congressional act.

2. Effect of *United States v. Lopez* on Commerce Clause Jurisprudence

Congress's broad power in regulating commerce narrowed in 1995 with the Supreme Court's decision in *United States v. Lopez*. The *Lopez*[116] decision is unique because it marks the first time since 1936 that the Court invalidated a congressional act based on the Commerce Clause. Since VAWA was enacted as an exercise of Congress's Commerce Clause powers, *Lopez* may have a profound effect on the enforceability and effectiveness of VAWA.

Lopez involved a violation of the Gun-Free School Zone Act of 1990.[117] This Act made it a federal offense for an individual to knowingly

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from Shreveport to certain points in Texas were unreasonable. *Id.* In response, the Commission established maximum class rates. *Id.* The Commission further ordered the carriers to refrain from charging higher prices for transportation of any good from Shreveport to Houston and Dallas. *See id.* at 347 (determining rate structuring utilized by railroad companies discriminated in favor of traffic within Texas and against similar traffic between Louisiana and Texas).

113. *See id.* at 351 (recognizing carriers are instruments of interstate commerce).

114. *Id.* Because it is permissible for Congress to legislate to protect commerce from molestation or hindrance, it is likewise within Congress's powers to require that the agencies of interstate commerce not be used in such ways as to "cripple, retard or destroy" commerce. *Id.*

115. *Id.* at 351–53. Congress may, in exercise of its paramount power, "prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce . . . [since Congress] does possess the power to foster and protect interstate commerce." *Id.* at 353. Congress may take all measures necessary to fulfill this end, even if the measures involve controlling intrastate activities. *Id.*

116. 514 U.S. 549 (1995).

117. Pub. L. No. 101–647, § 1702, 104 Stat. 4844–45 (codified as amended at 18 U.S.C. § 922(q)(2)(A) (Supp. 1997)); *see Lopez*, 514 U.S. at 551 (concluding that Gun-Free School Zone Act of 1990 exceeds Congress's commerce power); *cf.* Printz v. United States, 117 S. Ct. 2365, 2367 (1997) (concerning constitutionality of Brady Act's interim provisions "com-

discharge or attempt to discharge a firearm at a place the individual knows is a school zone.[118] Alfonso Lopez, Jr., a high-school student, was convicted of violating the Gun-Free School Zone Act by possessing a firearm on school grounds.[119] On appeal, Lopez challenged the constitutionality of the Act under the Commerce Clause.[120] In analyzing the constitutionality of this Act, the Court identified three categories of activity that Congress may regulate under its commerce power: first, Congress may regulate the use of channels through which interstate commerce travels;[121] second, Congress is empowered to regulate and protect the in-

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manding state and local law enforcement officers to conduct background checks on prospective handgun purchasers"). The Brady Act "purports to direct state law enforcement officers to participate, albeit temporarily, in the administration of a federally regulated scheme." *Id.* at 2369. Petitioners, chief law enforcement officers (CLEOS) for Ravali county, Montana and Graham county, Arizona, objected to being compelled into federal service and argued that such congressional action was unconstitutional. *Id.* at 2369–70. Examining the constitutions history and structure, and the court's jurisprudence, the court held that "[t]he federal government may neither issue directives requiring the states to address particular problems, nor command the state's officers . . . to administer or enforce a federal regulatory program." *Id.* at 2370, 2384. Specifically, in evaluating the structure of the Constitution, the court acknowledged Congress's enumerated powers to enact laws requiring or prohibiting certain acts, but nonetheless concluded that Congress's authority did not extend to compel directly the states to enforce those laws. *Id.* at 2379. For example, the Commerce Clause empowers Congress to regulate interstate commerce, but it does not authorize Congress to proscribe the method by which state governments regulate interstate commerce. *Id.* at 2379.

118. Gun-Fee School Zone Act, § 1702, 104 Stat. at 4844 (codified as amended at 18 U.S.C. § 922 (q)(2)(A)).

119. *See Lopez*, 514 U.S. at 551 (stating that state charges were dismissed after federal agents charged Lopez with violating Act). On March 10, 1992, Alfonso Lopez, Jr., then a twelfth grade student at Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun and five bullets. *Id.* Lopez was confronted by school authorities and he admitted carrying the weapon. *Id.* Lopez was subsequently arrested and charged with firearm possession on school grounds under Texas law. *See id.* (noting existence of Texas law similar to § 922(q), which was subsequently dropped in favor of prosecution under federal law).

120. *Id.* at 551. The day after state charges were brought against Lopez, they were dropped and replaced by federal charges. *Id.* Lopez was then charged with violating the federal Gun-Free School Zone Act of 1990. *Id.* A federal grand jury indicted Lopez for knowingly possessing a firearm within a school zone, in direct violation of § 922(q). *Id.* In response to these charges, Lopez moved to dismiss the indictment on the ground that § 922(q) was an unconstitutional exercise of Congress's powers. *Id.*

121. *See* United States v. Darby, 312 U.S. 100, 117–18 (1941) (holding Fair Labor Standards Act of 1938 constitutional under Commerce Clause). The question answered in *Darby* was whether Congress, through the enactment of the Fair Labor Standards Act, had the power to prevent the use of interstate channels for the shipment of lumber manufactured under labor conditions that fell below the standards created by the Act. *Id.* at 108. The Act established a scheme to prohibit the introduction into interstate commerce commodities produced by employees whose wages were either below the required minimum or

strumentalities of interstate commerce, or persons and things in interstate commerce, even though a threat may come only from intrastate activities;[122] and finally, Congress's authority under the Commerce Clause includes the power to regulate those activities that have a substantial relation to interstate commerce.[123] The court determined that only the third category merited analysis because the first two categories were inapplicable.[124]

The Court recognized four factors to be relevant to its determination of the constitutionality of laws enacted by Congress pursuant to its Commerce Clause powers: (1) the economic nature of the activity to be regulated; (2) the jurisdictional limitations of the regulation; (3) the need for congressional findings; and (4) the practical implications of the government's arguments.[125] Under the first factor, the Court reasoned that the economic nature of the regulated activity at issue was relevant to the de-

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whose weekly hours were greater than the maximum prescribed. *Id.* Fred W. Darby was indicted for alleged violations of the Act. *Id.* The Court reasoned that although manufacture was not interstate commerce, the shipment of manufactured goods through interstate channels was commerce, and the prohibition of such was a regulation of commerce. *See id.* at 113 (noting regulation of interstate channels as one power proscribed by Chief Justice Marshall in *Gibbons*).

122. *See Lopez*, 514 U.S. at 558–59 (reiterating that regulating intrastate activities affecting interstate commerce is one of Congress's three broad powers under Commerce Clause).

123. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22, 49 (1937) (holding that Jones & Laughlin Steel Corporation violated National Labor Relations Act of 1935). In a proceeding under the National Labor Relations Act, the National Labor Relations Board (NLRB) found that Jones & Laughlin Steel Corporation violated the Act by discriminating against union members. *Id.* at 22. Jones & Laughlin allegedly discriminated with regard to hiring and determining tenure of employment. *Id.* The company was charged with coercion and intimidation in an effort to obstruct its employees' ability to self-organize. *Id.* Specifically, the company was accused of discharging employees based on their political affiliations. *Id.* The NLRB sustained the charges and ordered the corporation to desist from such practices and to reinstate the employees. *Id.* at 22. Jones & Laughlin challenged this order by challenging the constitutionality of the Act. *Id.* at 25. The Court decided that the relevant inquiry was limited to the effect upon interstate commerce an activity may have, rather than the source of the injury. *Id.* at 32. Although activities may be intrastate in character, if these same activities bear a close and substantial relation to interstate commerce, Congress must be allowed to wield control over them to protect commerce from their potential burdens and obstructions. *Id.* at 37.

124. *See Lopez*, 514 U.S. at 559 (arguing that only one category of activity enables Congress to regulate under its Commerce powers in this case). The Court dismissed the first two categories of authority, holding that "§ 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentalist of interstate commerce or a thing in interstate commerce." *Id.*

125. *Id.* at 559–64.

termination of whether the Gun-Free School Zone Act was constitutional.[126] The Court found that section 922(q), the statute being challenged, was a criminal statute that "by its [very] terms [had] nothing to do with 'commerce' or any sort of economic enterprise . . . ."[127] Thus, the Court concluded that section 922(q) could not be sustained under precedent because the statute did not regulate an economic activity.[128]

Applying the second factor, the Court examined section 922(q) to determine if it contained a jurisdictional element that would ensure, in individual cases, that the firearm possession affected interstate commerce.[129] The Court found it significant that section 922(q) had no express jurisdictional element to limit its reach to a "discrete set of firearm possessions that [would] additionally have an explicit connection with or effect . . . interstate commerce."[130]

In considering the third factor, the Court noted that the relevance and significance of congressional findings regarding the effect of gun-possession in school zones on interstate commerce was helpful in making its independent evaluation. Nonetheless, the lack of such findings was irrel-

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126. *See id.* at 560 (arguing activity's economic character relevant factor in determining constitutionality under existing precedent). The most far-reaching example of Congress's Commerce Clause authority involved economic activity. *See* Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (establishing "aggregate theory" for interpreting requisite "effect" on interstate commerce). *Wickard* involved use of the Agriculture Adjustment Act, which attempted to control the volume of wheat moving in interstate and foreign commerce, to control the fluctuation in wheat prices. *Id.* at 115. To this end, the Act authorized the Secretary of Agriculture to ascertain and proclaim a national acreage allotment for the following year's wheat crop. *Id.* Roscoe Filburn owned and operated a small farm; it was his practice to raise a small acreage of winter wheat, with which he fed his poultry and livestock. *Id.* at 114. In 1941, Filburn harvested more wheat then was allotted to him under the Act and was subsequently penalized for the extra acres harvested. *Id.* at 115. Responding to Filburn's challenge that the Act was unconstitutional, the Court noted that although Filburn's contribution to the demand for wheat was trivial on its own, his contribution when combined with that of others "similarly situated" was far from trivial. *Id.* at 127.

127. *Lopez*, 514 U.S. at 561.

128. *Id.*

129. *Id.* at 562; *see also* United States v. Bass, 404 U.S. 336, 337 (1971) (requiring act to have nexus with interstate commerce in order for Congress to regulate firearms). The former act, 18 U.S.C. § 1202(a), criminalized a felon's reception, possession, or transportation in commerce of a firearm. *Id.* The possession component built into the Act was interpreted to mean that an additional connection to interstate commerce was required. *Id.* at 349. Consequently, the Court dismissed the conviction because the government failed to show the requisite connection with interstate commerce. *Id.* at 347.

130. *Lopez*, 514 U.S. at 562. The statute regulates an activity beyond the realm of commerce as that term is normally used. *See id.* at 581 (Kennedy, J., concurring) (arguing statute usurps traditional state powers and forecloses state experimentation with solutions to problem).

evant and not determinative of the Court's finding the Act unconstitutional.[131]

Finally, the Court considered the last factor, which called for a review of the practical implications of the government's assertion that possession of firearms within school zones resulted in violent crimes, thereby affecting the national economy in two significant ways. The government first posited that the substantial "cost of crime" would be borne by society as a whole and violent crimes would discourage individuals from traveling to areas that were perceived as unsafe.[132] Next, the government postulated that guns in schools pose a substantial threat to the educational process by threatening the learning environment, thereby producing a less effective citizenry and adversely affecting the nation's economy.[133] The *Lopez* Court rejected these two arguments, surmising that limitations on federal power are but a truism under the government's theories supporting section 922(q).[134] That is, "[t]o uphold the [g]overnment's contentions" it would be necessary "to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[135]

Applying these factors, the majority concluded that: (1) the possession of a gun in a local school zone was not an economic activity; (2) Lopez did not move in interstate commerce with the gun; (3) there was no built-in requirement of a connection to interstate commerce; and (4) the government drew "inference upon inference" in a manner that turned Congress's Commerce Clause authority into a general police power.[136]

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131. *See id.* at 561–63 (arguing that even if congressional findings would aid Court in its analysis of legislative judgement, findings that activity in question substantially affected interstate commerce were lacking).

132. *See id.* at 564 (finding source of flaws in government's cost of crime argument largely stemmed from government's concession that argument, itself, leads to regulation of activities clearly not within Congress's Commerce Clause powers). The Court points out that the government admitted, under its cost of crime argument, that Congress could regulate all activities that may result in violent crimes, regardless of their relationship to interstate commerce. *Id.*

133. *Id.* Under the government's "national productivity" argument, Congress could reach any activity that it concluded was related to a citizen's economic productivity. *See id.* (asserting government's reasoning potentially conducive to enactment of future congressional regulations in areas traditionally reserved to state jurisdictions).

134. *Id.* at 567. "The tendency of [§ 922(q)] to displace state regulations in areas of traditional state concern is evident from its territorial operation." *Id.* at 583 (Kennedy, J., concurring). Section 922(q) essentially creates an invisible federal zone extending 1,000 feet from the school's boundaries. *Id.* Throughout these areas, § 922(q) displaces programs implemented by school officials to prohibit the possession or use of guns within school zones. *Id.*

135. *Id.*

136. *Lopez*, 514 U.S. at 567.

Consequently section 922(q) was ruled an unconstitutional exercise of Congress's Commerce Clause authority.[137]

Lopez's effect on the scope of Commerce Clause analysis is a limitation on what Congress has traditionally viewed as a broad grant of power.[138] After *Lopez*, it is logical to conclude that congressional acts, which are noneconomic by nature, lack a jurisdictional element, and fail to demonstrate a nexus with interstate commerce will likewise be found unconstitutional.

3. Application of *Lopez* to Title III of VAWA

In considering the constitutionality of VAWA, the Senate declared that the Commerce Clause gave Congress "the authority to act even if the proposed law . . . does not directly effect 'commerce'."[139] Arguably, this statement no longer holds true after *Lopez*. Consequently, in order for Title III to survive constitutional challenges, the requirements enunciated in *Lopez* must be satisfied.

Title III does not purport to regulate an economic activity as required under the first factor of *Lopez*. Like the Gun-Free School Zone Act in *Lopez*, Title III attempts to regulate an activity, domestic abuse, which is criminal by nature.[140] Although this factor is not conclusive, proponents will need to look to cases other than those used to uphold regulations of economic activity under the Commerce Clause for constitutional support.[141]

Furthermore, Title III does not appear to have a jurisdictional element that would limit its applicability to situations when interstate commerce would be affected. In fact, Title III will arguably regulate only intrastate activities—a power reserved for the states. Conversely, Title II, another provision of VAWA, has a jurisdictional element because it addresses domestic violence situations when a husband travels from one state to an-

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137. *Id.* The Court acknowledged the long line of cases preceding it that gave great deference to Congressional authority; however, the Court declined to expand these broad powers to sustain § 922(q). *Id.*

138. *See* Sven Erik Holmes, *Introduction: The October 1995 Supreme Court Term*, 32 TULSA L.J. 355, 355 (1997) (stating that decision in *Lopez* is first time since 1937 that Supreme Court has limited Congress's power to enact legislation under Commerce Clause).

139. S. REP. NO. 102–197, at 52 (1991).

140. *See* Violence Against Women Act, Pub. L. No. 103–322, 108 Stat. 1902, 1941 (codified in part at 42 U.S.C. § 13981 (1994)) (providing remedy for crime of violence defined as act "that would constitute a felony . . . if the conduct presents a serious risk of physical injury to another").

141. *Cf.* Sven Erik Holmes, *Introduction: The October 1995 Supreme Court Term*, 32 TULSA L.J. 355, 355–56 (1997) (indicating that Congress lacks authority to legislate certain areas under Commerce Clause).

other to commit an assault against his estranged wife.[142] Thus, Title II addresses crimes affecting interstate commerce by providing a federal remedy for crimes executed during interstate travel or situations where the batterer pursues his fleeing victim across state lines in order to inflict further abuse.[143] Title III, however, contains no such limitation. Instead, Title III claims to provide a federal remedy, namely injunctive and monetary relief, to victims of crimes that are committed within a particular state and that have a minimal effect, if any, on interstate commerce.[144] Thus, Title III does not appear to meet the jurisdictional element required in *Lopez*.

Finally, the government argues that violence against women, in particular, violence inflicted upon women by their intimate partners, affects the national economy in ways similar to those argued by the government in its enactment of section 922(q) of the Gun-Free School Zone Act. The government asserts that:

> Gender-based crimes and the fear of gender-based crime restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full participation in the national economy.[145]

This argument resembles the failed "inference upon inference" argument presented by the government in *Lopez*. In light of the *Lopez* decision, an activity that affects the national economy may not necessarily affect interstate commerce.[146] Presumably, the Court now requires more than a chain of causation to bring an activity within the scope of Congress's

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142. *See* Violence Against Women Act, Pub. L. No. 103–322, § 2261, 108 Stat. 1902, 1926 (codified in part at 42 U.S.C. § 13951 (1994)) (responding to fact that battered women are often stalked by batterers after they attempt to leave state).

143. *See* S. REP. NO. 102–197, at 40 (1991) (espousing ways in which Title II, entitled Safe Homes for Women, is designed to address domestic violence). The first man tried under this particular provision of VAWA was Christopher Bailey, who was accused of kidnapping and beating his wife, Sonya Bailey. *See Man Is First to Be Tried Under Tough Federal Law*, THE RECORD (N. N.J.), May 17, 1995, at A15 (reporting on first case to implement VAWA's federal remedy against domestic violence committed while traveling across state lines), *available in* 1995 WL 3464244.

144. Violence Against Women Act, Pub. L. No. 103–322, 108 Stat. 1902, 1941 (codified in part at 42 U.S.C. § 13981 (1994)).

145. S. REP. NO. 102–197, at 52 (1991).

146. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (stating that "absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause that interference contradicts the federal balance the framers designed and that this Court is obligated to enforce").

commerce power.[147] Although Title III regulates activities that arguably affect the national economy, which in turn affects interstate commerce, this realization is not "substantial" enough to pass constitutional muster after the *Lopez* decision.[148] Nonetheless, Title III is a valiant effort by Congress to remedy the inadequate response by state judicial systems to violence against women despite its questionable constitutional base.

C. *Fourteenth Amendment Analysis*

Supporters of Title III allege that the Fourteenth Amendment provides congressional authorization for the enactment of VAWA.[149] However, Title III appears to violate both Sections One and Five of the Fourteenth Amendment.[150]

1. Section One—Requirement of "State Action"

Section One of the Fourteenth Amendment declares that no *state* shall deny any individual within its boundaries the equal protection of the laws.[151] The Supreme Court has explicitly interpreted this clause to apply only to situations where state laws or persons acting under color of state law have denied an individual the equal protection of the laws.[152] Thus, some state involvement is necessary in order to invoke the protections of Section One.[153] Because Title III attempts to redress wrongs committed

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147. *See id.* (describing limits on Congress's Commerce Clause power).

148. *Cf. id.* at 588 (describing Constitution's narrow definition of commerce).

149. S. REP. NO. 103–138, at 55 (1993). The Committee on the Judiciary declared that Title III was appropriate Fourteenth Amendment legislation because "it attacks gender-motivated crimes that threaten women's equal protection of laws . . . [and] provides a necessary remedy to fill the gaps and rectify the biases of existing state laws." *Id.*

150. *Cf.* Civil Rights Cases, 109 U.S. 3, 11 (1883) (indicating that state action is required to utilize Fourteenth Amendment).

151. U.S. CONST. amend. XIV, § 1 (emphasis added).

152. *See Civil Rights Cases*, 109 U.S. at 11 (determining Section One of Fourteenth Amendment to be applicable only to actions involving state). Violations of one's rights by an individual are beyond the scope of the Fourteenth Amendment. *Id.* The Fourteenth Amendment does not give Congress the power to create municipal laws that regulate private rights. *See id.* (noting Fourteenth Amendment authorizes Congress to provide redress against operations of state laws).

153. *See* Shelley v. Kraemer, 334 U.S. 1, 23 (1948) (holding state enforcement of private, discriminatory restrictive covenants "state action" under rubric of Fourteenth Amendment and thus unconstitutional). The Fourteenth Amendment does not prohibit merely private conduct, but if such conduct is judicially enforced, the enforcement will be deemed the requisite state action that will allow the injured party to invoke the protections of the Fourteenth Amendment. *See id.* (noting that private discriminatory covenants are constitutional, but judicial enforcement of such not constitutional); *see also* United States v. Guest, 383 U.S. 745, 755 (1966) (noting state involvement depriving individual of equal protection need not be direct to invoke equal protection of Fourteenth Amendment). The

by an individual perpetrator, it is arguable that Title III does not address "state action" as it has been interpreted and applied by the Supreme Court.[154]

2. Section Five—Requirement of Appropriate Legislation

Although Section One has been interpreted to protect citizens from discriminatory state action, some authorities indicate that Congress may be able to address purely private conduct through Section Five of the Fourteenth Amendment.[155] The Court has previously acknowledged that Congress has wide latitude under this section, having stated that "[Section Five] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[156] For a particular piece of legislation to be determined constitutional under Section Five, it must have a legitimate equal protection goal, and the means employed to attain this goal must be likewise constitutionally permissible.[157]

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conspiracy involved between a private individual and the state police was furthered by "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." *Id.* at 756; *see also* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 942 (1982) (holding creditor's attachment of property under Virginia attachment statute sufficient state action). *Lugar* concerned a situation where the creditor, Edmondson Oil Co., Inc., sought and received a prejudgment attachment on Lugar's property. *Id.* at 924. Lugar claimed that respondents had acted jointly with the state of Virginia in attaching his property. *Id.* at 942.

154. *See* S. REP. NO. 103–138, at 48 (1993) (indicating purpose of VAWA's Title III to redress gender violence committed by individuals, not state).

155. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (suggesting Congress's powers extended beyond literal reading of written word of Constitution).

156. *Id. Katzenbach* concerned section 4(e) of the Voting Rights Act of 1965, which provided that "no person who has successfully completed the sixth primary grade in a school" in which the predominant classroom language was "other than English shall be denied the right to vote in any election because of his inability" to read, write, understand, or interpret English. *See id.* at 643 n.1 (noting law enacted by Congress to ensure Fourteenth Amendment rights of those educated under "American-flag[ged]" schools in which their predominant language was other than English). New York's election laws required voters to have an ability to read and write English; section 4(e) prohibited the enforcement of those laws. *Id.* at 643–44. Appellees, registered voters in New York, challenged the constitutionality of section 4(e). *Id.* The Court held that section 4(e) was "plainly adapted" to furthering the aims of the Equal Protection Clause. *See id.* at 652 (recognizing effect of section 4(e) to be prohibition of enforcement of laws denying franchise right to New York's Puerto Rican community).

157. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (defining standard of review to determine whether state law is constitutional); *see also* Boerne v. Flores, 117 S. Ct. 2157, 2158 (1997) (finding Religious Restoration Act of 1993 unconstitutional under Section Five of the Fourteenth Amendment). The Religious Restoration Act

Since one of Title III's primary goals is to "fill" the void and correct the inequalities present in existing state laws governing domestic violence, Section Five may be applicable.[158] The Court has unequivocally declared that remedying state laws, which fail to afford equal protection to all people within their jurisdiction, is a legitimate equal protection goal.[159] Thus, Title III arguably fulfills the first requirement of Fourteenth Amendment analysis, since it attempts to provide a remedy for such failures at the state level.[160]

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of 1993 (RFRA) was enacted by Congress to prohibit all governments, state and federal, from promulgating laws that would substantially burden an individual's exercise of religion "even if the burden results from a rule of general applicability." *Id.* RFRA will not apply if the government can demonstrate that the burden furthers a compelling governmental interest and is the least restrictive means available to further that interest. *Id.* In *Boerne*, the local zoning authorities in the City of Boerne relied on an ordinance governing historic preservation and denied the Catholic Archbishop a building permit to enlarge St. Peter Catholic Church. *Id.* The Archbishop challenged the permit denial under RFRA. *Id.* at 2160. The ensuing litigation centered on the constitutionality of RFRA under Section Five of the Fourteenth Amendment. *Id.* Interpreting Congress's powers under Section Five to be remedial and preventive, the Court concluded that RFRA could not be considered appropriate Section Five legislation because it "[was] so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 2166, 2170. Remedial laws enacted under Section Five should address the mischief and wrong intended to be proscribed by the Fourteenth Amendment. *Id.* at 2170. The Court determined that RFRA was not so confined.

> Sweeping coverage [of RFRA] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local governments. . . . RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. . . . RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

Id. at 2170.

158. *See* S. REP. NO. 103–138, at 48 (1993) (declaring that filling gender gap forsaken by traditional civil rights legislation was Title III's goal and purpose). The Judiciary Committee recognized that the lag in the criminal justice system to address crimes committed in the home against women was due largely to the victim's gender. *See* S. REP. NO. 101–545, at 40–41 (1990) (professing VAWA to be significant step toward treating crimes against women as seriously as other assaults).

159. *Cf.* Plyler v. Doe, 457 U.S. 202, 213 (1982) (indicating that state laws must apply equally to all people). In applying the Equal Protection Clause to state laws, the Supreme Court stated that it only sought to assure that the law bore a "fair relationship to a legitimate public purpose." *Id.* at 216.

160. *See* S. REP. NO. 101–545, at 28–29 (1990) (declaring that one purpose of VAWA is to fill void left by state laws).

The Fourteenth Amendment also requires a legitimate means by which the permissible end is to be attained.[161] Consequently, since Title III's principal goal arguably constitutes a legitimate end, the question becomes whether Title III is an appropriate vehicle to fulfill this end. Title III imposes liability on any person who denies another the right to be free of gender-motivated violence.[162] If a person violates this right, Title III provides the victim with a federal cause of action. More importantly, if the victim prevails, compensatory and punitive damages, as well as injunctive and declarative relief, are provided by this statute.[163]

It is debatable whether Title III is an appropriate application of Section Five as contemplated by the Supreme Court, since Title III does not cure the Fourteenth Amendment violations committed by the states.[164] Clearly, Title III does not provide a remedy against biased state laws, nor does it fill the inadequacies in state judicial systems.[165] Instead, what Title III purports to do is remedy the conduct of an individual violator by providing the victim with monetary damages.[166] Consequently, since Title III does not compensate the victims of gender-based violence for the equal protection violations they are subjected to by state judicial systems, Title III cannot be deemed the appropriate legislation contemplated by the Founding Fathers or defined by the Supreme Court.

D. *Recommendation*

Although Title III does not satisfy constitutional requirements, it may be amended to preserve the goals and intent of VAWA while passing constitutional muster. The proposed amendment should read:

> A civil cause of action against the *state* will exist if the plaintiff can prove a *conspiracy* between the individual violator and the state. A conspiracy will exist if the state's purported punitive action against the criminal helps or encourages the criminal to commit his gender-based act of violence.

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161. *See Plyler*, 457 U.S. at 217 n.15, 218 n.16 (discussing different levels of scrutiny for applying Equal Protection Clause of Fourteenth Amendment).

162. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902-55 (codified in part at 42 U.S.C. § 13981 (1994)).

163. *Id.*

164. *See* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779, 797 (W.D. Va. 1996) (holding that "the state action at issue (inadequacies in the state criminal systems) does not cause or, in any significant manner, even contribute to the deprivation caused by the individual criminal" VAWA was enacted to address).

165. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902, 1941 (codified in part at 42 U.S.C. § 13981 (1994)).

166. *Id.*

This proposed amendment arguably fulfills the requirements of both Sections One and Five of the Fourteenth Amendment. First, the requirement of state involvement under Section One is met by requiring a victim of gender-motivated violence to prove that some action by the state is the cause, however tangentially, of her Fourteenth Amendment violations. Second, this proposed amendment satisfies Section Five since it attempts to redress a conspiratorial offense committed by a state in violation of the Fourteenth Amendment. Arguably, if Title III is amended as proposed, opposition to its constitutionality will likely cease. Consequently, victims of gender-motivated crimes will be afforded a remedy.

IV. VAWA As a Tool for Texas

A. *Texas's Statutory Remedies*

Although Title III is controversial, VAWA as a whole remains a viable method for combatting domestic violence. States, like Texas, can use VAWA as a guideline for eliminating gender-based violence. Family violence is as pervasive in Texas as it is throughout the nation. In fact, the Texas Department of Human Services has reported that in 1992 alone, 639,712 Texas women were physically assaulted by their male partners.[167] Responding to these overwhelming figures, Texas enacted civil and criminal laws to eradicate the problem of domestic violence.

1. Title IV—Protection of the Family

In 1979, the Texas Legislature enacted a civil remedial scheme to combat domestic violence, entitled "Protection of the Family," which affords victims of family violence the right to obtain civil protective orders against their abusers.[168] An application for a protective order may be filed by an adult member of the household for his or her own protection or for the protection of "any other member of the family or household."[169] In the protective order, the court may do several things, which

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167. Gender Bias Task Force of Texas Final Report 66 (1994).

168. *See* Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. Tex. L. Rev. 353, 356 (1992) (tracing history of Title IV of Family Code). Russell argues that the theory behind civil protective orders should be to end the assailant's behavior quickly and inexpensively. *Id.* However, Russell proceeds to question the motives behind the numerous amendments to Title IV. *Id.* at 356–57.

169. Tex. Fam. Code Ann. § 71.04 (Vernon 1996); *see also* Tex. Fam. Code Ann. § 71.121 (Vernon 1996) (requiring respondent of protective order to make separate application for protective order against applicant); Moreno v. Moore, 897 S.W.2d 439, 442 (Tex. App.—Corpus Christi 1995, no writ) (holding trial court without authority to enter mutual protective order where respondent did not file application for protective order). The appellate court stated that a mutual protective order may be issued if it includes an agreement pursuant to section 71.12(a), which would facilitate the court proceedings. *Id.* at 442.

include, but are not limited to, prohibiting the assailant from: (1) committing family violence; (2) communicating directly with a member of the household; and (3) going to or near the residence or place of employment of a household member.[170] Courts are further empowered to enter immediate temporary orders if the court finds "clear and present" danger directed toward a household member.[171] Enforcement of these orders is expedited by the court's power to enter civil contempt sanctions in the forms of fines and short-term confinement.[172]

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170. TEX. FAM. CODE ANN. § 71.11(b) (Vernon 1996). One survey notes, however, that despite gaining access to the courts, victims of domestic abuse, particularly woman, encounter hurdles that prevent them from obtaining the protection intended by the particular state's domestic abuse statutes. *See* Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 186 (1993) (reporting results of survey conducted to determine frequency of issuance and scope of protective orders). These hurdles include a delay in the issuance of orders due to overcrowded court dockets, denial of orders due to the judiciary's attitudes regarding domestic abuse, and the denial of particular requests. *Id.* at 199–206; *see also* Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1044 (1992) (reviewing types of relief provided by protective orders). Protective orders can be designed to prevent the batterer from harassing the victim at work or home. *Id.* Moreover, the typical protective order contains provisions regarding child custody and visitation, and often requires the batterer to seek counseling. *Id.*

171. TEX. FAM. CODE ANN. § 71.15 (Vernon 1996). Some domestic violence experts recommend that judges issue emergency orders promptly and include remedies appropriate for each situation. *See* Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 187 (1993) (evaluating judicial system's record regarding potential implementation hazards of emergency orders). The most dangerous period for a victim of domestic abuse is that period of time when she attempts to escape the violence; consequently, a delay in the issuance of emergency orders may cost a victim her life. *Id.* Moreover, judicial denial of particular remedies threaten an order's effectiveness. *Id.* at 195. For example, some courts deny petitioners the use of the residence, whereas others allow the batterer unrestricted visitation. *Id.* One commentator notes that victims involved in battering relationships usually begin the process of seeking state protection by obtaining a temporary order on an *ex parte* basis. *See* Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1043 (1992) (discussing effectiveness of civil protection orders). Topliffe asserts temporary orders are useful preventions against a batterer's intimidation of the victim, best employed while the victim seeks permanent judicial remedies. *Id.* at 1042.

172. TEX. FAM. CODE ANN. § 71.16(a) (Vernon 1996). Each protection order issued must contain the following statement in either capital letter or in boldface type: "A PERSON WHO VIOLATES THIS ORDER MAY BE PUNISHED FOR CONTEMPT OF COURT BY A FINE OF AS MUCH AS $500 OR BY CONFINEMENT IN JAIL FOR AS LONG AS SIX MONTHS OR BOTH." *Id.*; *see also* TEX. FAM. CODE ANN. § 71.18 (Vernon 1996) (defining duties of law enforcement agencies when faced with domestic altercations). In order to facilitate a police officer's ability to assess a domestic violence situation, the police department is required to provide access to information regarding the

2. Chapter Five—The Criminal Provision

Chapter Five of the Texas Criminal Code of Procedure is the criminal counterpart to Title IV. In Chapter Five, the Texas Legislature articulated two broad statements: (1) family violence is a serious danger and threat to society as a whole; and (2) any peace officer responding to domestic violence shall protect the victim, regardless of the relationship between the alleged perpetrator and victim.[173] Chapter Five mandates that the primary duties of police officers intervening in family violence are to protect potential victims, enforce the law, and make lawful arrests.[174] An investigating police officer is required to advise any adult victim of all reasonable means to prevent future violence.[175] This advice generally in-

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names of those protected by the orders and the name of the person to whom the order is directed. *Id.*; *see also Ex Parte* Fernandez, 645 S.W.2d 636, 639 (Tex. App.—El Paso 1983, no writ) (holding that warnings required by Chapter 71 of Texas Family Code were inapplicable to temporary orders in question). On December 28, 1982, Armando J. Fernandez was imprisoned for contempt of court for failing to pay child support and for disobeying temporary orders to return property issued on September 22, 1982. *Id.* at 637. As one of five grounds for relief, Fernandez asserted that the temporary orders did not contain the requisite warnings as prescribed by section 71.16(a). *Id.* at 639. The court denied this ground of relief, stating that chapter 71 was inapplicable to the aforesaid temporary order. *Id.*

173. TEX. CRIM. PROC. CODE ANN. art. 5.01 (Vernon Supp. 1997); *see also* TEX. CRIM. PROC. CODE ANN. art. 5.03 (Vernon Supp. 1997) (stating police officer's duties of protection are not diminished when parties involved in dispute are related).

174. *Id.* art. 5.04.

175. *Id.* art. 5.04(c). Written notice is sufficient if it substantially corresponds to the following:

NOTICE TO ADULT VICTIMS OF FAMILY VIOLENCE

It is a crime for any person to cause you any physical injury or harm EVEN IF THAT PERSON IS A MEMBER OR FORMER MEMBER OF YOUR FAMILY OR HOUSEHOLD.

Please tell the investigating peace officer.

IF you, your child, or any other household resident has been injured; or

IF you feel you are going to be in danger when the officer leaves or later,

You have the right to:

ASK the local prosecutor to file a criminal complaint against the person committing family violence; and

APPLY to a court for an order to protect you (you should consult a legal aid office, a prosecuting attorney, or a private attorney). You cannot be charged a fee by a court in connection with filing, serving, or entering a protective order. For example, the court can enter an order that:

(1) the abuser not commit further acts of violence;

(2) the abuser not threaten, harass, or contact you at home;

(3) directs the abuser to leave your household; and

(4) establishes temporary custody of the children and directs the abuser not to interfere with the children or any property.

cludes giving notice of a victim's legal rights and remedies and providing information regarding the availability of shelters.[176]

Similar to Title IV, the Texas Code of Criminal Procedure also sanctions violations of a protective order. According to Section 25.07 of Title VI, Chapter 25 of the Penal Code, a person violates a protective order and thereby commits an offense if said person knowingly or intentionally commits, among other things, family violence, travels to or near the residence of a protected individual, or communicates directly with a household member in a threatening or harassing manner.[177] Moreover, a police officer is given the right to arrest an abuser without a warrant when the officer has probable cause to believe either one of two events has occurred: (1) the abuser violated a protective order in the officer's presence; or (2) the abuser committed an assault on a member of his family or household.[178]

A VIOLATION OF CERTAIN PROVISIONS OF COURT-ORDERED PROTECTION (such as (1) and (2) above) MAY BE A FELONY.
CALL THE FOLLOWING VIOLENCE SHELTERS OR SOCIAL ORGANIZATIONS IF YOU NEED PROTECTION.

Id.

176. *Id.* art. 5.04(b).

177. TEX. PENAL CODE ANN. § 25.07 (Vernon Supp. 1997); *see* Lee v. State, 799 S.W.2d 750, 754 (Tex. Crim. App. 1990) (ruling written agreement between parties in protective order enforceable by criminal sanctions). Lee alleged that the protective order was invalid because it failed to order, decree, or direct him to refrain from traveling to his former wife's residence, the complainant in this case. *Id.* at 751. The court responded by stating that section 25.08 does not require a specific command that the party perform or not perform the specified activity. *See id.* at 754 (stating statutory warnings required by protective order amounted to adequate notice to Lee of possible criminal charges); Small v. State, 809 S.W.2d 253, 255 (Tex. App.—San Antonio 1991, pet. ref'd) (holding that in order to sanction violation of protective order, state must prove beyond reasonable doubt that respondent of order "knowingly and intentionally" violated court order). Small contended that because he did not know that there was court order, he could not violate it. *See id.* at 255 (countering Small's argument, state asserted since Small was not aware of protective order, it was affirmative defense). The court held that a defendant is not presumed to know the contents of every court order and that the State meets its burden of proof only by showing that the defendant was knowingly and intentionally in violation of a particular order. *Id.* at 256; *see also* Patton v. State, 835 S.W.2d 684, 689 (Tex. App.—Dallas 1992, no pet.) (concluding exclusion of information from order pursuant to section 71.111 is not defense to prosecution from any violation of said order). Patton argued that the order was invalid because it failed to describe complainant's place of business pursuant to section 25.08(a)(3)(A) of the Texas Penal Code. *Id.* at 688. The court, however, held that the exclusion of complainant's place of employment did not render the order invalid under section 71.111(a)(2) of the Texas Family Code. *Id.* at 689.

178. TEX. CRIM. PROC. CODE ANN. art. 14.03 (Vernon Supp. 1997); *see* Amores v. State, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991) (stating "totality of circumstances" test to be appropriate test for determining probable cause for warrantless arrest); Covarrubia v. State, 902 S.W.2d 549, 553 (Tex. App.—Houston [1st District] 1995, pet. ref'd) (indicating

3. The Persisting Problems

The foregoing statutes and subsequent amendments therein reflect the continued commitment by the Texas Legislature to address the growing problem of domestic violence; however, problems in enforcing these statutes have lead to the continued growth of domestic violence.[179] Accordingly, the Supreme Court of Texas authorized the creation of the Gender Bias Task Force of Texas ("Task Force"), which was commissioned to identify specific problems within the judicial system and to recommend solutions on how to thwart the lingering tragedy of domestic violence through legal reform.[180]

The Task Force discovered that "gender bias in the Texas courts *does* exist and that too many Texans . . . experience discriminatory or inequitable treatment in the Texas judicial system simply because of their sex."[181]

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court must examine all information known to all officers participating in arrest to determine whether or not probable cause existed for warrantless arrest); Morgan v. State, 816 S.W.2d 98, 102 (Tex. App.—Waco 1991), *pet. ref'd per curiam*, 817 S.W.2d 706 (Tex. Crim. App. 1991) (holding that "[s]tate has burden of proving existence of probable cause at time arrest was made and existence of circumstances which made procuring of warrant impracticable"); *see also* Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929, 930–31 (1991) (expounding benefits of pro-arrest policies). Pro-arrest policies are beneficial in many ways including, but not limited to, breaking the violent cycle, decreasing future violence, sending a message to the batterer that the community will not tolerate such violence, and giving the victim the belief that she has the ability to escape her captor. *See id.* at 930–32 (arguing importance of police intervention and accountability of municipalities for police failure to respond).

179. *See generally* James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection of Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1181 (1995) (evaluating Texas's record regarding legislation enacted to combat domestic violence and noting ineffectiveness of such legislation).

180. *See* GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 1 (1994) (stating purpose of Task Force to be determination of existence and extent of gender bias in Texas's judicial system in order to provide solutions for reducing and eliminating gender bias). To obtain the information needed, the Task Force surveyed the attitudes of those involved in the judicial system, including attorneys, judges, and experts. *Id.*

181. *Id.* at 17. The Task Force discovered that the patterns of bias that women experienced centered around the following:

1. Women experience hostile, demeaning, or condescending treatment by attorneys and judges and may be held to higher standards than their male counterparts.
2. Women face both financial and logistical barriers to access to the courts.
3. Biased behaviors and attitudes at all levels of the judicial system affect women's credibility in court and may have an impact on both the litigation process and case outcome.
4. The adversarial nature of the family law system perpetuates gender inequities and often has severe financial repercussions for women.
5. There is a lack of understanding at all levels of the judicial system of the dynamics of crimes against women.

According to the Task Force, the problems in implementing the civil and criminal statutes are attributable to numerous factors. The first of these factors is related to the general lack of expertise within the legal community regarding the drafting and application of protective orders.[182] For instance, the Task Force reports that judges erroneously impose mutual protective orders in situations where only one victim exists, in effect, placing partial blame for family violence on the victim.[183] Another factor the Task Force finds relevant to the growth of domestic violence is the collective ignorance of victims regarding their rights under the law.[184] More-

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Id.

182. *See id.* at 66–67 (documenting problems in implementing protective orders). The Task Force found that the availability of adequately tailored protective orders was another barrier victims of domestic violence faced. *Id.* at 67. In fact, many prosecutors simply offered form motions and orders due to the tremendous volume of requests for orders that overburdened their offices. *Id.* One attorney noted that some district attorneys ask only for basic facts when they pursue protective orders and implement only the simple ones because of the volume of requests. *Id.*; *see also* Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 174 (1993) (evaluating protective orders and subsequent reforms). One problem women experienced with their attorneys in domestic violence cases was dissatisfaction with their attorneys' work. *Id.* at 177. These women were dissatisfied with their attorneys either because their attorneys did not ask for the remedies they wanted or the lawyers negotiated their remedies away. *See id.* (asserting possible explanations for dissatisfaction stemmed from fact that attorneys were not willing to take time needed to assess clients' situation or practice by some lawyers to act paternalistic in their representation).

183. *See* GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 67 (1994) (demonstrating situations when protective orders are inappropriately issued). One such situation arises when judges issue mutual protective orders even though only one party has shown abuse. *Id.* at 67–68. One advocate testified that mutual protective orders place some blame for the violence on the victim. *Id.* at 68. Moreover, another advocate expressed the belief that judges issue mutual protective orders to avoid dealing with the real issues of domestic violence. *Id.*; *see also* Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1040 (1992) (arguing that mutual protective orders are harmful towards domestic violence victims). Topliffe asserts that mutual protective orders harm victims of family violence in two ways: first, they strengthen the batterer's belief that the problem is the result of factors he cannot control, and thus the blame does not belong to him. *See id.* at 1060–61 (noting mutual protective orders help batterer avoid accountability and reinforce victim's belief that no one understands her plight). Second, mutual protective orders cause confusion among those who are called upon to implement them. *See id.* at 1061–62 (asserting that violations of mutual protective orders lead to confusion, police "do not know which party has a history of battering" and thus are unsure whom to arrest).

184. *See* GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 71 (1994) (recognizing that problems with implementation of protective orders are further aggravated by ignorance of victims). The testimony of the previous director of the Women's Advocacy Project indicated that a victim's ignorance is one of the most serious barriers to her ability to utilize the protections offered by the legal system. *Id.*; *see also* Kit Kinports & Karla

over, after surveying the attitudes held by those in the judicial system toward victims, the Task Force concluded that the general mood regarding family violence was apathetic at best.[185] The Task Force's research revealed that a significant number of individuals within the judicial system lack sufficient knowledge regarding the dynamics of family violence and sexual assault, which results in the complication of a female victim's efforts to secure adequate protection.[186]

Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 169 (1993) (arguing victims' ignorance regarding orders of protection one of most serious problems of access). Although steps have been taken to overcome the problems caused by lack of information like simplifying forms, requiring court clerks to assist the victims in completing the forms, and providing legal counsel to victims, these steps have not been particularly helpful due to numerous other factors. *See id.* at 170–72 (arguing simplified forms are still too complicated and access to legal counsel is still hampered by victim's finances).

185. *See* GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 72 (1994) (describing attitudes held by those in judicial system regarding domestic abuse victims). Through its studies, the Task Force learned that "domestic violence is viewed as less serious than other criminal acts, that women's experiences are minimized, that a victim's credibility is questioned, and that women suffering from abuse may even be blamed for causing the abuse." *Id.* Moreover, the Task Force discovered a pervasive attitude in the legal system that accused women of lying about their experiences; this attitude is believed to affect the development and utilization of laws designed to protect women from family violence. *Id.*

186. *See id.* at 77 (recognizing how lack of knowledge regarding domestic abuse encourages environment of violence and can have dangerous consequences for victims). This lack of understanding can lead to cases being dismissed or being mishandled. *Id.* A judge in Bexar County testified that it was common practice in the County for judges to dismiss cases when a victim no longer wished to prosecute the case. *Id.* Moreover, the previous director of the Women's Advocacy Project testified that the lack of knowledge regarding domestic violence often leads to lawyers referring victims to *mediation* "when such a move may be inappropriate because of a history of violence between the parties." *Id.*; *see also* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2142 (1993) (arguing that "theory and practice of mediation pose serious problems for its use as a resolution device when a relationship involves a culture of battering"); Andree G. Gagnon, Recent Development, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 273 (1992) (arguing mandatory mediation puts victims of family violence at risk for more abuse). Gagnon further asserts that mediation does not work in domestic violence cases, particularly in divorce cases where a history of domestic violence has been established. *Id.* at 274. Mediation is inappropriate because it is intended for use between parties with equal bargaining power; because of the nature of domestic violence, a batterer and his victim can not "bargain" from a level field. *See id.* at 274–76 (arguing further that private nature of mediation sends message to society that family abuse is not criminal act in which society should be involved); Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 864 (1985) (asserting mediation is not answer to domestic violence due to "passivity and learned helplessness" of victims, nonmutual nature of violence, and seriousness of spousal abuse, which should be classified as crime).

B. *Applying VAWA As a Tool in Texas*

1. VAWA's Non-Controversial Provision

The Violence Against Women Act contains one provision in particular that is potentially conducive to the reforms the Texas Legislature must implement to adequately address domestic violence.[187] Title II, entitled "Safe Homes For Women," encourages the implementation of pro-arrest policies by awarding grants to states and municipalities that demonstrate that their laws mandate the arrest of spousal abusers based on probable cause.[188] Moreover, Title II awards grants to states that implement training and policy development programs for law enforcement officers and prosecutors, as well as to states that create training programs for judges in relation to cases involving domestic violence.[189] Using these provisions, Texas should structure its laws and programs to take advantage of these beneficial elements.

2. Implementing VAWA Provision to Remedy Texas's Domestic Violence Problem

a. A State Constitutional Civil Right to Be Free from Domestic Violence

Although Title III of VAWA may lack federal constitutional authority, the Texas Legislature still has the power to draft a *state* constitutional civil right that will redress the injuries of victims of domestic violence and sup-

187. *See* S. REP. NO. 103–138, at 42–43 (1993) (discussing purposes of Title II of Violence Against Women Act). The Senate expounded five ways in which Title II was designed to address domestic violence, including providing more federal resources and giving states significant incentives to treat family violence as a serious crime. *Id.*; *see also* S. REP. NO. 101–545, at 37–38 (1990) (describing need for federal response to domestic abuse). The Senate report asserted that one of the ways to stop the "chronic violence" is to treat domestic abuse as seriously as any other criminal assault. *Id.* at 38.

188. *See* S. REP. NO. 103–138, at 37–38 (1993) (designing manner in which states are able to utilize federal resources). The purpose of this section is to encourage pro-arrest policies. *Id.* at 37. In order for a state to qualify for federal grants, the state must demonstrate a commitment to fighting domestic violence through its laws and official policies. *Id.*; *see also* S. REP. NO. 101–545, at 38 (1990) (arguing merits of affirmative action against domestic violence). The Senate report recognized that arrests can stop abuse. *Id.* In fact, the Senate asserts that police intervention can lead to a decrease in subsequent assaults by 62%. *Id.*

189. Violence Against Women Act, Pub. L. No. 103–322, § 2101(b), 108 Stat. 1902, 1932 (codified in part at 42 U.S.C. § 13971(a) (1994)); *see* S. REP. NO. 103–138, at 43–44 (1993) (discussing measures of Title II). Another purpose proposed by the Senate for the enactment of Title II is to provide significant incentives and encourage states to treat domestic violence as a crime. *Id.* Under this Title, a model state program is created, which encourages reform in many areas of the law, including prosecutorial and judicial policies. *Id.*

plement the existing statutes. This state civil law will enable a victim of gender-motivated violence to bring suit against her abuser in a state court, where questions of constitutionality will likely be precluded. The statute should mirror Title III as the following recommendation illustrates.

RECOMMENDATION 1:
A person who commits a crime of violence motivated by gender and thus deprives another of the right to be free from crimes of violence motivated by gender shall be liable to the injured victim, and recovery of compensatory and punitive damages shall be given to the victim, as well as injunctive and declaratory relief if necessary to protect and prevent future abuse, and any other relief as a court may deem appropriate.

b. Training Policies

The problem of implementing the statutes designed to address domestic violence in Texas is largely due to the inadequate training of police officers, prosecutors, and judges.[190] Since Title II provides grants to states that implement comprehensive training programs for the significant participants in the judicial system, the following recommendation regarding use of such funds is suggested.

RECOMMENDATION 2:
a. The Texas Legislature must make it mandatory for all police officers to have continuing education regarding domestic violence and sexual assault.[191] The Texas Legislature must also expressly prohibit judges from exercising their discretion in issuing mutual protective orders in situations where only one victim exists.[192]
b. The Texas State Bar must require ongoing education for prosecutors and judges regarding the dynamics of domestic violence and sexual assault.[193]

By precluding judges from exercising their discretion in issuing mutual protective orders, the petitioner seeking a protective order, bearing none

190. *Cf.* Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After* Lopez, 96 COLUM. L. REV. 1876, 1889–90 (1996) (indicating lack of enforcement by police and prosecution in domestic violence situations).

191. *See* GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 9 (1994) (providing recommendations regarding appropriate actions to be taken against domestic violence).

192. *See id.* (recommending to judges that "mutual protective orders should not be entered without proper pleading and proof").

193. *See id.* (providing that State Bar offer attorneys some educational programs regarding dynamics of domestic violence to attorneys).

of the blame for the situation, will place more confidence in the judicial system to deal with this life threatening problem.[194] This faith in the judicial system may encourage victims to report domestic violence as well as deter would be abusers for fear of being reported. Moreover, by implementing continuing education programs, judges, police officers, and prosecutors will be better informed of the changing dynamics of domestic violence and thereby less prone to dismiss cases that come before them as something private and outside the judicial system.[195]

c. Pro-Arrest Policies

Title II promotes pro-arrest programs by providing grants to states that implement such schemes.[196] Because the lingering problems in implementing the existing Texas statutes may be partly due to the discretion given to police officers regarding the arrest of suspect batterers, Title II funds should be used to address this situation.

RECOMMENDATION 3:
The Texas Legislature should draft a statute requiring the mandatory arrest by police officers of a suspected batterer in situations where there is physical evidence of abuse at the scene of a domestic dispute.

Requiring police officers to arrest a batterer in situations where physical evidence of abuse exists provides relief to an otherwise volatile situation and takes the discretion out of the police officers hands when they may not comprehend the complexity of the problem.[197] This provision

194. *See id.* at 68 (providing that majority of female attorneys surveyed believed mutual protective orders were issued erroneously). One commentator suggested that mutual protective orders are less likely to be enforced because they "cancel each other out," resulting in the police's failure to respond. *See id.* (asserting theory that general lack of expertise concerning protective orders exist in legal community).

195. *See* Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 237 (1993) (discussing need for educating police and judges regarding dynamics of family violence). These commentators assert that educating police officers and judges about the complexities of domestic abuse will sensitize them to the dilemmas facing a battered woman, and consequently improve their record in enforcing protective orders. *See id.* at 237–38 (suggesting most effective program entails joint effort between police officers and domestic violence advocates).

196. Violence Against Women Act, Pub. L. No. 103–322, § 2101(b)(1), 108 Stat. 1902, 1932 (codified in part at 42 U.S.C. § 13971 (1994)); *cf.* S. REP. NO. 102–197, at 40 (1991) (stating that Title II focuses on crimes of domestic violence and recognizes that Federal Government needs to provide additional resources to fight this violence).

197. *See* Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1151 (1994) (arguing that mandatory arrest policies alone will not solve problem of domestic violence). Welch, however, recognizes the merits of mandatory arrest policies, namely, taking the responsibility for initiating the arrest away from the victim and removing police discretion. *Id.* The

not only provides the victim time to decide her future course of action, but also gives the batterer time to contemplate his past actions.[198] Moreover, a mandatory arrest policy will convey a message of intolerance for domestic violence to the batterer, the victim, and society as a whole.[199]

V. CONCLUSION

Title III of the Violence Against Women Act provides a federal civil right for victims of gender-motivated crimes. Yet, there are questions regarding the constitutionality of this Act. Supporters of the provision argue that Title III is a necessity for women, particularly women who are battered by their intimate partners. Moreover, supporters contend that Title III will find constitutional authority under both the Commerce Clause and the Fourteenth Amendment. Conversely, opponents of the provision argue that Congress overstepped its constitutional boundaries by enacting Title III. However one views this act, the fact remains that domestic violence has reached epidemic proportions. Thus, it must be stopped and the perpetrators must be punished. Whether Title III is the appropriate way of preventing and remedying this atrocious crime is debatable. Nonetheless, a carefully drafted amendment could save VAWA from being found unconstitutional.

Furthermore, the Violence Against Women Act may prove useful for implementing programs in Texas that would effectively curtail the growth of domestic violence. By adopting mandatory arrest policies, educating the public and significant participants in the judicial system, and endorsing a state constitutional civil right to victims of gender-motivated crimes, Texas will provide victims of domestic abuse the protection they desperately need and the remedies they deserve.

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intent behind mandatory arrest policies is to protect the victim while deterring the batterer from future abusive behavior. *See id.* at 1156–57 (declaring mandatory arrest policies futile if not implemented in tandem with comprehensive reforms in training and education of police officers, prosecutors, and judges).

198. *See id.* at 1151–53 (evaluating merits and drawbacks of pro-arrest policies, specifically mandatory arrest policies). The intent behind pro-arrest policies is to protect the victim and to deter subsequent attacks. *Id.* at 1153–54. The results from the landmark Minneapolis Domestic Violence Experiment demonstrated the deterrent effect of mandatory arrest policies, finding that these policies are "the most effective deterrent to repeat incidents of battering, and . . . did not . . . increase recidivism." *Id.* at 1152.

199. *See* Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L 163, 235 (1993) (suggesting mandatory arrest policies, along with education of justice system's players, may improve "overall responsiveness" of system of protective orders). Kinports's surveys show that there is a correlation between counties that implement mandatory arrest policies and judicial and enforcement systems that regard violence against women a priority and a serious crime. *Id.*